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No.

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

Kathy V. Williams,

Petitioner

v.

John G. Potter, Postmaster General and
The United States Postal Service,

Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit and
To The United States District Of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether complaints of employment discrimination against federal agencies; specifically in this matter: The United States Postal Service; have heightened standards of prima facie and Federal Rules of Civil Procedures than non-federal entities under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, Americans with Disabilities Act and Vocational Rehabilitation Acts, McDonnell-Douglass Corp. v. Green, 411 U.S. 792(1973)as affirmed by Swierkiewicz v. Sorema, N.A. 534 U.S. 506(2002).

II. Whether the lower courts' failure to review and consider 'all the available evidence' of the federal agency's pretext, perjury and misrepresentations affords indirect, unlawful immunity and exemption from law(s) through representation by the Office of the United States Attorney General's when presented vs. Pro Se serving to deny the constitutional right of self-representation. Whether justice mandates adjudication by counsel-of-record or consideration of evidence.

III. Whether protection against 'regarded as disabled' attaches upon such perception's creation of adverse employment action. Whether the lower courts' duration specifications empowers employers' use of 'regarded as disabled' for pretext of unlawful, discriminatory and retaliatory actions in violation of the letter and intent of Title VII of the Civil Rights Act of 1964, Americans with Disabilities and Vocational Rehabilitation Acts.

IV. Whether Defendants' pleading for and the lower courts' adjudication of taxation against Petitioner; a federal employee; in filing discrimination charges violates *Notification of Federal Employees Anti-discrimination and Retaliation Act*(NO FEAR) by imposition of civil charges prohibited by the Act is lawful. Whether such filing serves as direct evidence of retaliation and is actionable.

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IN THE
SUPREME COURT OF THE UNITED STATES

Kathy V. Williams,
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v.

John G. Potter, Postmaster General and
The United States Postal Service,
Respondents
(Rule 14.1(b): Caption contains names of all the parties)

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT and
TO UNITED STATES DISTRICT OF KANSAS
BRIEF FOR PETITIONER, PRO SE

INTERESTS OF THE UNITED STATES

This Writ presents four important questions seeking ruling by this Supreme Court in re application of Federal Rules of Civil Procedure Rule 8 by lower court rulings in conflict with the uniformity of the Rules application at employment discrimination claims and affecting governing laws and Acts under Title VII of the Civil Rights Act of 1964 et al,42 U.S.C. 2000 et al, The Vocational Rehabilitation Act of 1973 et al, 29 U.S.C.706, 791,794 et al and as amended Section 504(1986), Title I of The Americans with Disabilities Act et al, 42 U.S.C. 12112,12203 and THE NO FEAR ACT of 2002 et al, 5 C.F.R. 724; hereinafter The Acts.

Lower courts rulings contradict established legal precedents and laws set forth by statutes, Its own rulings, other appellate court rulings and this Supreme Court of the United States.

The Supreme Court of the United States has jurisdiction in

this matter as the lower court(s) rulings establish new precedents inconsistent with the letter and intent of the governing federal laws. As such, their affect extends beyond the matter of WRIT before the court and affords lower courts to supercede legislative, Presidential acts and rulings by the Supreme Court. *On Writ To* rendered in favor of summary judgment for Respondents as final entered by District of Kansas Court on the 19th August 2004; final judgment by The Tenth Circuit Court of Appeals of 29th September 2005 and *en banc* re-hearing denial of 21st November 2005. Post-submission and pre-notification of initial WRIT, Kansas District Court OVERRULED motion for re-hearing and by implication upheld judgment of costs against Petitioner in violation of The NO FEAR ACT of 2002 in favor of Defendants/Respondents on the 22nd day of February 2006.

STATEMENTS

I. and II..

This appeal concerns the adequacy of a complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000, Americans with Disabilities Act, 29 CFR 1630 and Vocational Rehabilitation Act of 1973. In relevant part, these enactments order it to be unlawful for employers to "discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment due to such individual's race, color, religion, sex, national origin, protected activity or disability."

Federal Rules of Civil Procedure 8(a) governs the content of pleadings in all suits of a civil nature in the United States district courts directing that complaints initiating action *'contain statement of jurisdiction, demand for relief and a short plain statement of the claim showing petitioner is entitled to relief. No technical forms of pleading or motions are required.* Fed. R. Civ. Proc. 8(e)(1).

Petitioner is a United States citizen of African descent. Respondent; The United States Postal Service; is a federal entity of the United States government.

Presented evidence supported Petitioner's claims thereby not entitling Respondents' to Summary Judgment. The clerk's failure to include and/or make notation of exhibits supplied during proceeding [illegible]ly noted such notations were later inserted; does not excuse judicial failure to consider *ALL* available evidence listed in avoidance of continued clerk omission. Petitioner's Docketed Number Seventy-Two(72) purposely cites and cross-references exhibits/evidence supplied to the court to ensure the same were not again separated and/or withheld without the court's knowledge upon review of Plaintiff's Motion.

Court findings based on *"no evidence supplied by plaintiff"* can not be reconciled with cursory review of Petitioner's filings. Judicial statements and court ruling on the bases of 'no evidence' render appearance that judicial obligation to consider "all evidence" was not met. Evidence by transcripts, regulatory manuals, et al and by Respondents' sworn testimonies; albeit varied, contradictory and thereby perjured; as rendered by Petitioner supports the claims. .(See Appendix: Letters to Attorney General(s)-No Reply). The lower courts did have reasonable expectation for Respondents' representative; assistant in the United States Attorney General's(USAG) Office to accurately represent the matter before It, this did not occur. The court's unmet expectation does not justify Its failed duty to consider all the available evidence .presented by Pro Se Plaintiff. Foundational premises of The Bill of Rights and Constitution [law] afford the citizenry reasonable expectations that self-representation holds the same guarantees of justice by judicial obligation and rulings on the facts in evidence without prejudice or preference to representing counsel.

The lower court's near-verbatim recitation of the USAG's erred presentations is contradicted by direct evidence on each matter before the court (e.g.: transcripts of sworn testimony in re Associate Supervisor Program(ASP and Supervisors of Customer Service) - the regulation; which the court acknowledged - is not disputed but the fact Respondents' **failed**

to adhere to such regulations is supported by evidence.

In 1998, Petitioner filed suit under Title VII of the Civil Rights Act claiming Respondents unlawfully failed to promote in retaliation of protected activity. Evidence supports Petitioner was one of seventeen meeting Respondents' qualifications for twenty available positions for which hundreds applied.

Petitioner's previous EEO activity; as direct-causal nexus was included in her evaluation for promotion. Said action had been settled and was precluded from inclusion by law. As causal nexus resulting in retaliatory promotion denial, and in violation of protected activity privileges, all former agreements were invalidated by Respondents' unlawful inclusion. Inclusion in and at the evaluative process for promotion resulted in Respondents' failure to promote in accordance with Its governing rules. In addition to the other sixteen qualified employees, Defendants sought and obtained **previously disqualified** applicants for twenty-one vacancies while failing to promote Petitioner. Facts supported by evidence.

Respondents' national governing rules, regulations and principles of calculation could not have disqualified and excluded her from promotion but rather guaranteed promotional placement in the absence of inclusion of previous EEO activity. Nor was it for non-discriminatory reasons the previous EEO counselor failed to appropriately consider Petitioner's promotional requests as established by regulations. District court acknowledged the rules in its findings while ignoring Respondents' failure to properly apply. (*District Summary Judgment Conclusions, Vratil, Page 7, Paragraph 2).* Evidence reveals Respondents' pretext effort to cover Its action with non--discriminatory reasons is unjustifiable. Proper procedure guaranteed Petitioner promotional placement . Evidenced by supplied national regulatory documentation, procedural manuals, sworn affidavits, and testimony supplied the court. Respondents' and Its representatives, board members and governing procedures dictated compilation of scoring. By Respondents' admission, applicants deemed unqualified for the positions and participated in call-back sessions were later promoted.. Defendants' falsification of documents and perjury can be inferred as Its discriminatory pretext and ensured against Summary Judgment in Respondents' favor.. The Court erred by judicial acceptance of pretext based on regulatory national

scoring. Petitioner's claim that composite scoring would and could not have exceeded her *qualified score* from promotional placement while advancing applicants with scores deemed as *unqualified.*

Respondents' inability to justify non-promotional placement of Petitioner by prescribed regulations caused Respondents' to alter their initial explanation and sworn affidavits. In the interim, Respondents' created and offered *altered governing manuals* inconsistent with national dissemination to substantiate a newly derived pretext. In the year 2000, an administrative judicial hearing was held in compliance with exhaustion of remedies. During EEO hearing aware of the penalties of perjury and in contradiction to previously sworn testimony, Respondents' representatives' alleged failure to promote Petitioner was not based on composite scoring but solely on the interview process. Falsely depicted, Respondents' altered pretext of Petitioner's interview as extremely poor and reason for failure to promote. As Respondents' promotional process is to be based on composite scoring, this and alteration of previously sworn rendering of non-discriminatory reasons can be deemed by reasonable prudence as Respondents' pretext to cover the true discriminatory nature of their actions.

The lower court failed to consider the evidence and exhibits of Respondents' altered proffered rationales. The court's application of what should have transpired versus what actually occurred are not based on facts or evidence. The lower courts continued exclusion of and failure to consider Petitioner's supplied evidence was duly noted The lower court's position for basing Its findings upon the one-sided and misrepresented claims of Respondents' counsel is affirmed by "*Plaintiff purports to dispute many of defendant's factual statements, but she does not refer to portions of the record on which she relies. Accordingly, the court deems such facts admitted.*" . Petitioner's precautionary citing and enumeration of supplied evidence upon re-submission; *Doc. No.* 72[1] by judicial inference was not considered. Petitioner acknowledges the clerk of the lower court did fail to

properly file supplied evidentiary appendix. However the precise enumeration and reference to said documents dictated their review had Petitioner's Pro Se submissions been considered for judicial conclusion. The lower court's failure has caused a grievous travesty in lieu of justice.

The district court granted Respondents' motion for summary judgment in part requesting Respondent re-submit Its effort outside of time to achieve summary judgment for the remainder.

Petitioner claims the district court's action may have been greatly and wrongly influenced by her Pro Se representation vs. an assigned assistant attorney general. Further, Petitioner states the lower court had both duty and obligation to consider the facts before It in their entirety for the purpose of sound and just ruling. District courts can not consider the United States' representation of Its entities as bases for one-sided evaluation of the matters before the court. The court's doing so would; and did in this matter; irreparably immunize entities of the United States from adherence to governing law and ethics of legal behavior. In so doing, the court de-robes and divests itself of authority to enforce the law without prejudice. Sole acceptance of Respondent's misrepresented[2] facts to the exclusion of Petitioner's evidence from the courts consideration contradicts the purpose of litigation, can not unequivocally afford Justice and negates the pretense of a democratic judicial system and due process wherein the United States is a party.

The district court's failure to afford Pro Se litigant equal and just consideration violates the mandates of this Supreme Court as ruled in *Faretta v. California*, 42 U.S. 806(1975) and deters exercising of the fundamental right enforceable by 28 U.S.C. 1654, The United States

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[2] As an assistant United States Attorney General and officer of the court, Respondents' counsel had duties to present a case most favorable to his client. The USAG's knowing misrepresentation violates standards of service required of officers of the court to avoid subversion of justice. However, it remains the lower court's judicial obligation to access and determine the facts of each case without prejudice of position and/or representation. 28 U.S.C. 57.951, 60(b)(1), 60(b)(3),et seq.

Constitution and The Bill of Rights for self-representation. In so doing, the court eradicates recourse against entities of the United States and specifically The United States Postal Service. Emphases is placed on the latter from Petitioner's experience wherein Respondents' continued, aggressive and exacerbated retaliation in the effort to exercise *protected* privileges; stated herein and proceeding; was met with cessation of, erred, unpredictable and selective compensation. Such action causing financial hardship and insecurity mandates self--representation as the only affordable *and lawful* recourse to inherent delays and continued subjection to unlawful acts.

Petitioner's complaint properly stated a claim for relief under Federal Rule of Civil Procedure 8. This Court has held that the Rule is satisfied if the complaint provided Respondent fair notice of the character and grounds of the claim. Petitioner's complaint gave such notice by asserting discrimination on the bases of race, national origin, color and disability identifying the adverse and discriminatory employment acts. Rule 8 requires no more.

The court of appeals' requirement that employment discrimination complaints demonstrate a prima facie case to survive summary judgment is in error. The lower court's holding can not be reconciled with this Supreme Court's decisions of rejecting heightened pleading standards under Rule 8 and disregards the purpose of history of Rule 8. The Tenth Circuit's upholding and enforcement of a heightened Rule 8 standard attempts to enforce pleading procedures which this Court has prohibited.

Had the lower court served as a factfinder, the "*implausibilities, inconsistencies, incoherencies and contradictions*" inherent of Respondents' proffering of non-discriminatory reasons for their acts the court would have rationally found them unworthy of credence. Respondents' perjured variations sufficiently negate credibility evidencing inability to provide a non-discriminatory cause for their actions.

Petitioner's complaints and evidence support Respondents' varied discriminatory activities predominantly demonstrated by failure to properly assign, promote and afford uninterrupted employment and

ongoing in fulfillment of the threat to Petitioner. Each complaint and action made by Petitioner were resultant of Respondents' violation of Its governing rules and regulations. Petitioner's inquiries and/or complaints regarding Respondents' violations were met with instructions and requirement to Petitioner to "file another EEO complaint". Respondents' knowledge of the farcical nature of the required process and failure to enforce or serve as recourse for employees fails to deter and has led to the cause and source of societal, universal coinage of a tragic and unlawful activity in this agency's name.

Evidence filed by Petitioner support her claim in each instance as presented to the district court and attached herewith. Ergo, the district court's findings as upheld by the Tenth Circuit in re Respondents' failure to promote Petitioner in accordance with federal governing regulations through Its Associate Supervisor Program(ASP); Supervisor, Customer Services, Shawnee Mission; Supervisor, Customer Services, Olathe;
lateral placement into Air Records Processor position; and
lateral placement into Clerk Stenographer position; unfounded disciplinary actions; reduction of base pay; failure to regularly and properly compensate and employment denial. **(Significance of law requires employment denial be addressed separately before this Supreme Court.)** Each cited incident; inclusive of denial; is representative of the hostile work environment Petitioner was subjected, are a mere exemplification of Respondents' provable discriminatory actions against Petitioner.

Petitioner presents the matter in its entirety before this Supreme Court on the bases that each offense claimed by Petitioner is supported by evidence. AND THAT, each instance of Respondents' discriminatory actions is affirmed by "*implausibilities, inconsistencies, incoherencies, contradictions*" and perjured testimony that it was "*permissible for the [factfinder(s)]to infer the ultimate fact of discrimination from the falsity of the employer's explanation*" Reeves v. Sanderson 530 U.S. 147 "*and that such is consistent with the general principle of evidence law that the factfinder can consider the dishonesty about material fact as*

affirmative evidence of guilt."

II. and III.

This question significantly requires redress before this court by the potential precedents being established by Kansas District and the Tenth Circuit courts which contradict laws and rulings by the Supreme Court in the application of The American with Disabilities Act and The Vocational Rehabilitation Act; hereinafter The Acts. The district court's findings directly contradict law and established precedents of this Supreme Court. The Court's ruling is required on this matter affecting the outcome of all disability suits by definition and application of the law plausible by the lower's court revision of precedent and interpretation of the law.

Petitioner filed against Respondents' unlawful employment denial as in violation of The Acts was upheld by the district court and Tenth Circuit contradicting the latter's and Supreme Court rulings and law and precedents defining consideration under Sections 501 through 504 and 510 of The Americans with Disabilities Act of 1990, 42 U.S.C. 12210 et seq., The Vocational Rehabilitation Act of 1973, 29 U.S.C. 794 et. seq. and the Civil Rights Act of 1964, 2000 U.S.C. 2000e, et seq.

Violations under the Acts prohibits discrimination on the bases of disability which does not impede work performance nor create danger in the workforce. Disability as defined by the Acts clearly cite ***"being regarded as having an impairment"*** ADA, Section 3.2©). The district court's ruling errs in finding; ***"Because plaintiff has not demonstrated that she suffered from a disability, defendant is entitled to summary judgment on her claim of disability discrimination"(*** Docket Memorandum Order 70 by Judge K. Vratil) and upheld by Tenth Circuit.

In 1997, Petitioner was inflicted with an on-the-job injury. August 1998, Respondents' mandate of Petitioner to supply unlawful, discriminatory medical documentation in violation of 29 C.F.R. 1630.15(a), 29 C.F.R. 1630.13(b),29 C.F.R.10 and 29 C.F.R. 1630.2(m)(n) which were not a business necessity nor job-related. Respondents' specifically created an unauthorized form for completion by Petitioner's medical provider. Upon completion and

submission of the unlawfully mandated form, Respondents' claimed there was no work available for Petitioner. Petitioner's efforts to report as scheduled were met with threats with *forcible removal* by Respondents' manager.
Pretext of this claim is evidenced by Respondents' representatives sworn testimonies that Petitioner's had continued in the performance of her assigned job duties.

Respondents' required Petitioner file an EEO in response to employment denial while refusing to afford return to duty. Petitioner was denied employment through January 1999. Respondents' action, exhaustion of leave lack of financial income required Petitioner file for Employment Compensation benefits. Respondents' discovery of this claim led to their contesting Petitioner's award of unemployment benefits. Respondents' notified the Missouri Division of Employment that Petitioner was off work at her request. This action led to cessation of benefits and no compensation through December 1998 as Petitioner was required to appeal Respondents' false claim. At the Missouri Division of Employment's determination that Respondents could not supply supportive documentation, Petitioner's appeal was granted. At said granting, Respondents' permitted Petitioner to return to duty.

Respondents' failure to adhere to Its practices, regulations and governing rules by this action are direct evidence of discrimination. That such action was discriminatory is further evidenced by Respondents' failure to permit and/or require *fitness for duty* examination as dictated by The United States Postal Service Employee Labor regulations.

Respondents' making this evaluation as bases for their action classify Petitioner's claim under The Americans with Disabilities and Vocational Rehabilitation Acts during the administrative/EEO hearings of 2000. No such claim or inference had been previously cited to Petitioner or Missouri Division of Employment. Responsible Respondents' sworn testimony allege Petitioner was 'perceived as her arms were affixed to her side'. Demonstrated and expounded upon during the administrative hearing, it was Respondents' testimony that Petitioner's affixation did not permit performance of normal and

regular functions. The acting and responsible manager sworn admission of this perception as bases for Petitioner's employment denial while simultaneously supporting the testimony of others knowledge that Petitioner was performing her job duties using all extremities. Apparent to prudent and the non- it is evident both scenarios can not be an accurate reflection of Respondents' perception.

Respondents' unlawful requirement for additional information was submitted by Petitioner as an on-the-job injury on appeal. For that cause, Respondents' had specific knowledge of Petitioner's abilities signifying pretext devised for administrative hearing.

The injury was on appeal due to untimely filing of Petitioner's paperwork by her primary physician. The injury was accepted in October 2001 by the Department of Labor. As of this date, **Respondents refuse to approve reimbursement** in accordance with governing statutes due to Petitioner's claims against them.

The district court erred. It was at the district court's discretion; and upheld by Tenth Circuit; to apply at the least dual precedents and laws relative to this matter. Indeed,it was not only *"permissible for the* courts *[factfinder*(s)*]to infer the ultimate fact of discrimination from the falsity of the employer's explanation"* Reeves v. Sanderson 530 U.S. 147 *"and that such is consistent with the general principle of evidence law that the factfinder can consider the dishonesty about material fact as affirmative evidence of guilt." "based on the implausibilities, inconsistencies, incoherencies, contradictions"* by Respondents', justice required.

The lower court's negation of Petitioner's ADA claim requires the Supreme Court's attention in its elimination of governing statutes and legal requirement.

District court's dismissal of Petitioner's ADA claim is states *"Because plaintiff has not demonstrated that she suffered from a disability, defendant is entitled to summary judgment on her claim of disability discrimination"(* Docket Memorandum Order 70) violates letter and intent of the American with Disabilities Act of 1990 and Vocational Rehabilitation Act 0f 1973. Congressional establishment of these clear and concise provisions expressly to prohibit

discrimination was ignored by judicial non-compliance and application of standards of disability as defined. Section 3.2 of the Americans with Disabilities Act defines the term disability to *'an individual --*

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual'.

(C) being regarded as having such impairment

The lower court was obligated to apply the Acts Section 3.2(A) definition if Respondents' pretext of Petitioner's physical condition was accepted. By law, Petitioner's claim withstood the court's erred application of prima facie and heightened Rule 8 standard.

The district court is not responsible for determination of a Petitioner's medical condition solely on the bases of appearance. (In this instance, because judiciary could see Petitioner could move arms.) It was the courts' duty to enforce the law without prejudice, which it failed to do.

Were court assigned to base Its rulings and opinions by visual, medical perception of Petitioner's bench appearance, the law required enforcement of The Act(s) due to Respondents' alleged perception of *regarding Petitioner as having impairment.*

Petitioner's claims are supported by the evidence available to the court and is based on the legal definitions as cited.

Tenth Circuit Court supported the district court's finding in ruling. *"To the contrary, the district court correctly determined that Williams' four month restriction was of insufficient duration to qualify as disability under the Act."*

Supreme Court ruling on this issue is mandated to ensure uniform application and non-reduction of applicability which this lower court's rulings negate.

Petitioner avers complications from the on-the-job injury were reported to require surgical correction per her licensed medical specialist. The procedure was not been performed complicated by Respondents' actions, loss of leave, delayed approval and complications created by *deadly* prescription(i.e. recalled: Duract) for treatment of the on-the-job injury.

However, the issue before the lower courts was not Petitioner's

medical condition. The issues for the court to consider were Respondents' pretext rationale and The Acts which defined such pretext as falling under their purview.

The precedents set by district and Tenth Circuit court on this matter directly contradict these, all other and the Supreme Court's rulings. Kelley v. Metallics West, 04-1051(10th Circuit), this court ruled: *"An employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limits created by his or her own faulty perceptions."* **Further Tenth Circuit cited,** *"...reasonable accommodation makes no distinction between employees who are actually disabled and those who are merely regarded as disabled." "We conclude that an employer must reasonably accommodate employees* ***regarded or perceived as disabled.***" Without intervention of this Supreme Court and by precedent established by the lower courts, it becomes the employers' determination of acceptable reasons to **regard** an employee as disabled. By further inference, violation of the Acts would be acceptable so long as it were for an undefined duration. Thus affording discrimination, financial duress and forced termination of employment by means of the Act for discriminatory and/or retaliatory reasons. Application of the Tenth Circuit's standard peculiar to this complaint requires the law specify a time frame of applicability. The law does not.

Previous rulings by the Tenth Circuit conflict with Its, other appellate courts and the Supreme Courts ruling in this matter. *Copelin-Brown v. New Mexico State Pers. Office 04-2099(10th Cir. 03/02/05; Green v. State of New Mexico 04-2160(10th Cir.) 08/31/05;Doebele v. Sprint/United Mgmt. Co. 342 F.3d 1117,1130 (10th Cir.)(2003); Southwestern Comm. College v. Davis 442 U.S. 397,410(1979); Woodman v. Runyon, 96-4104(12/24/97)* citing Shiring v. Runyon, 90 F.3d 827-32(3rd Cir.)(1996); Borowski, 63 F.3d at 138; Buckingham v. U.S. 998 F. 2d 735,741-42*(9th Cir.)* and *Orr v. City of Albuquerque, 03-2287, (10th Cir. 2003).*

WHEREAS, the former cases as cited confirm to the letter and intent of protections provided by The Civil Rights, The American with Disabilities and Vocational Rehabilitation Acts; herein reference The Acts; the courts' ruling in this matter conflicts with

the uniform application of federal laws and established precedents.

The Supreme Court's ruling in this matter is mandated in avoidance of reducing the of ability to enforce guarantees provided by The Acts with specificity to discrimination by the third prong of disability as defined by law. Failure to invalidate the lower courts ruling affords subjection of innumerable employees to the methodical abuse by employers for unlawful discriminatory actions. The lower courts' rulings afford discriminatory, retaliatory employers to affect adverse employment actions by incremental, feigned attribution of disabilities of short duration negating provided protection from such actions.

In response to either position; *actual or temporary disability;* the lower court's findings are in error. Respondents' could not have regarded Petitioner as unable to move her arms. This is evidenced by Respondents' requirements mandating documentation, disciplinary action regarding re-submission of form completion, filings, EEO
deadlines, interaction between the parties and most significantly Respondents' admission of Petitioner's performance of regular duty assignment. These factors are exacerbated by Respondents' failure to allege as contest against Petitioner's claim for benefits through the Missouri Division of Employment[2]. Without regard to pretext, it is Respondents' claim to have perceived and regard Petitioner as disabled. Under law, such suffices to mandate judicial application of The Acts.

[For the Record: Petitioner's on-the-job injury was inflicted by another employee/co-worker as recorded and reported via Dept. of Labor]

The lower courts' exclusion of Petitioner's claim under the American with Disabilities and Vocational Rehabilitation Acts (previously cited) was in error by its application of the heightened standard of duration versus adverse employment action.

The facts of this issue are two-fold. First, evidence on record of

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[2] If Respondents' pretext were not newly devised for administrative hearings, such claim would have been made for contesting Petitioner's unemployment compensation. As disabled; temporarily or otherwise; Petitioner would have been exempted from unemployment benefits.

testimonies, deposition and regulatory provisions of Respondents' responsible employee(s) and other witnesses employed by Defendants demonstrate the prooffered reason for Petitioner's work denial/adverse employment action is pretext of the actual, unlawful, discriminatory and retaliatory action taken against Petitioner.

Sworn testimony acknowledges and admits work-denial was taken with full knowledge that Petitioner was performing her assigned job duties. Thereby refuting Defendants later contrived rationale Petitioner was denied work due to its perception that "Petitioner's arms were affixed and immobile from her body" as assigned duties required such movement.

This contrived pretext supplied by Defendants as its 'legitimate reason', in light of the apparent contradictions, required the Court reject it on its face as an admission of guilt. Green v. State of New Mexico 04-2160(10th Cir. 08/31/05).; Doebele v. Sprint/United Mgmt. Co. 342 F.3d 1117,1130(10th Cir. 2003). And Miller v. Eby Realty 03-3307,04-3076(10th Cir.2005), Price Waterhouse 490 U.S. 228; TransWorld Airlines, Inc. v. Thurston 469 U.S. 111, 112.

The courts failure to consider all the evidence and view this issue as applicable to the discrimination claim set forth:

> *"...the* USPS *was not aware that plaintiff's work restrictions were limited to one arm."* (Vratil, Docket# 70, Page 8)

is readily refuted by status as on-the-job injury with history of one arm restriction as reported and recorded by Defendants. Evidence of intentional discrimination was further presented by the Defendants' failure to adhere to Its established procedure. Had Defendants' believed the later prooffered disability, procedure required medical examination by Defendants' provider pre-denial of employment. Further evidenced by Defendants' specific creation and mandated completion of a 'special' form for Plaintiff; in violation of Title I American with Disabilities Section 4(a) for an on-the-job injury whose history was recorded and retained by Defendants while acknowledging Plaintiff was performing assigned job duties.

Pretext perception later submitted by Respondents' that Petitioner could not move her arms away from her body would have been covered under the Acts by the false presumptions inherent affect on daily life functions and such limitations would seemingly have innate long term recovery.

At issue is the claimed perception is pretext and was known to be false by Defendants. However serving as Respondents' claimed perception, such qualified Petitioner for protection under the American with Disabilities and Vocational Rehabilitation Acts (cited previously).

Failure of the lower court to so apply the law avails this method of 'perceived disability' as a means and method by employers to inflict illegitimate, discriminatory, retaliatory actions against employees with judicial consent as long as such actions are sporadic and falls within the indeterminate but short duration.

The Tenth Circuit Court of Appeals upheld the lower courts conclusions in contravention of its own, other appellate and Supreme Court decisions in its stating:

"...the district court correctly determined that Williams' four month restriction was of insufficient duration to qualify as a disability under the Act." (9/29/05. Pg. 6).

Petitioner asserts the courts erred in applying a standard of duration to pretext and 'perceived disability' as neither affords accurate gauging of employers' erred perception. Judicial ruling affords determination of feigned, pretextual perceptions to be utilized as pretext for unlawful discriminatory actions at the discretion of the offending employer. (Again noted: Duration was shortened by Missouri Division of Employment's failure to accept Defendants then prooffered rationale that Petitioner requested leave of absence. Noting that Defendants did not present said pretext to Missouri but rather falsely advised Petitioner had requested voluntary leave of absence to stop payments. Compensation was resumed when the employer was unable to produce mandated forms in support of false contentions. Resumption of compensation led to employers' permitting Petitioner to return to duty with dictated restrictions.)

When action taken against an employee under the guise of "regarded as disabled" is pretext for an unlawful act, the courts' ascribing a length and/or duration defeats the purpose of protections provided by and undermines the intent of the Acts.

The Tenth Circuit Court of Appeals ruling in this matter is in direct contravention to the standard it established against non-federal entities in Orr v. City of Albuquerque, 03-2287 (10th 2005),:

"at the prima facie stage of the McDonnell Douglass analysis, a plaintiff is only required to raise an inference of discrimination not dispel the non-discriminatory reasons subsequently proffered by defendant EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184,1193 (10th Cir. 2000). *At the prima facie stage , the plaintiff's burden is "not onerous."* Texas Dep't of Cmty. Affairs v. Burdine 450 U.S. 248,253 (1981 *which is evidenced by the "small amount of proof necessary to create an inference of discrimination,"* EEOC v. Flasher Co. Inc., 986 F.2d. 1312 (10th Cir. 1992). Within this decision the Court further ruled: "*non-discriminatory reasons advanced by an employer to dispel the inference of discrimination raised by an employee at the prima facie stage, it can not...defeat an employee at the prima facie stage."*

This ruling is applicable to Petitioner's disability claim and inclusively negates the judicial ruling(s) of summary judgment in favor of Defendants.

Discrimination under the third prong 'regarded as disabled'; in this instance of pretext; would seemingly require that such not be afforded a standard of duration as the disability is based on the claimed inaccurate perception of an employer for the express purpose of prohibited activity.. Petitioner argues that the intent of the law affixes disability immediately when the employers perception causes an adverse employment action. In this matter, Petitioner was adversely affected by loss of benefits, loss of leave for the on-the-job injury (Defendants refuse to compensate to date), loss of leave accrual, retirement, bonus calculation awards, et al. All of which were immediate.

The court errs in affixing a length of duration to the Act(s) under the protection against "regarded as disabled". In affixing a duration, the court ignores the employers' 'cover-up' and thereby the nature, context, purpose and intent of provided protections.

Further, the Tenth Circuit Court of Appeals ruling of 29 September 2005 addresses the 'impairment' as an actual disability(Pg. 6) versus Respondents' 'regarding as disabled' and thereby fails to adjudicate by applicable law:

a covered entity mistakenly attributes such incapacitation would substantially limit major life activities and is not precluded from the Acts when the covered entity entertain misperceptions about the

individual that one does not have. ibid Doebele. Doebele v. Sprint/United Management Company, 01-3372(10th Circuit, 2003). (Petitioner's En Banc Request, Page 24). American with Disabilities and Vocational Rehabilitation Acts (previously cited).

IV.

The significance of this question seeks redress by the Supreme Court. Were the lower courts' ruling and judgment to stand, it negates and defeats the legislative purpose and intent of the *NO FEAR ACT*. This Court's ruling is mandated by the potential of allowing discriminatory and all other unlawful activity by federal entities to be unmonitored and uncensored.

Whether a federal entity is capable and/or willing to enforce the laws against another federal entity, governing laws establish directive in compliance with congressional intent of the *NO FEAR ACT*. The Attorney General and the Equal Opportunity Commission share this responsibility. However, it is the Attorney General's representative which fail to comply with established law by filing taxation against Petitioner which the lower court upheld in error.

Legislative implementation of the *NO FEAR ACT* of 2002 was designed to protect federal employees from such action and judgment as the District of Kansas and Tenth Circuit rulings inflict on Petitioner. As entities of the United States; in this instance;: The United States Postal Service; have prepaid representation by the United States and can prolong the process for eight(8) years as in this matter, it is inconceivable that a regular federal employee could afford retention and costs of counsel for their own representation. This is evidentiary demonstrated by the Postal Service's indiscriminate determination of work-denial, constant abolishment of Petitioner's positions, harassments, retaliation, hostile work environment incorrect, withheld and refusal of compensation, et al. The *FEAR* of being held accountable for taxation by the Attorney General would further deter employees to pursue justice against unlawful acts by their federal employers. In doing so, federal employers would become exempt from the governing laws and establish precedents for government and private agencies. Such which would no longer be under the purview of The United States Supreme Court and circumvent due process and the present judicial

system.

Petitioner with good cause and supportive evidence presented a viable case of discrimination against Defendants. Petitioner's expectation for uniform application of governing laws and precedents established for protection toward the same could not foresee that each system would fail to render justice against another federal entity.

The Attorney General and his representatives are required to be governed by the law as all citizens, members of the bar and officers of the court. Misrepresentation of the facts, purposeful support of unlawful activity by the United States Attorney General's representative assigned against Petitioner's claim may have been exacerbated by Petitioner's Pro se representation. The right to self-representation is upheld by the Constitution of the United States and does not rationalize nor justify unlawful activity by an officer of the Court.

As the United States Attorney General's Office and its representatives are duly assigned to enforce the law, it is a reasonable expectation for its officers to know the law.

Title VII, EEOC Management Directive 715 and its Compliance Manual Section 8: Retaliation and all laws derivative of the same ***prohibits*** statutory retaliation defined as *"any adverse treatment that is based on retaliatory motive and is reasonably likely to deter the charging party from engaging in protected activity."* This statute applies to Petitioner as an *"individual challenging employment discrimination under statutes enforced by EEOC, in EEOC proceedings, state administrative or court proceedings as well as in federal proceedings" et. seq.*

Such taxation negates the primary purpose of anti-retaliation provisions which are to *"maintain unfettered to statutory remedial mechanism, harms public interest by deterring others from filing a charge, undermines the effectiveness of EEO statutes and conflicts with the language and purpose of anti-retaliation provisions."*

This action is of grave significance and requires Supreme Court ruling in deterrence of the United States Attorney General office's taxation to the defeat of the laws which is their assignment to uphold and enforce.

Post-submission with this Supreme Court of initial Writ,

Petitioner received the findings of the district court in re taxation. In contravention of the purpose and intent of NO FEAR ACT and Title VII, 5 C.F.R 724 and. EEOC Management Directive and it Compliance Manual Section 8:*Title VII, EEOC Management Directive. Compliance Manual Section 8* : prohibits statutory retaliation defined as any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party from engaging in protected activity. Protection applicable for "individual charging employment discrimination under the statutes enforced by EEOC in EEOC proceedings, state administrative court or court proceedings as well as in federal proceedings."..... provisions prohibits in its central purpose that adverse actions of unfounded civil charges that are likely to deter reasonable people from pursuing of their rights of protected activity and undermines the effectiveness of the EEO statutes and conflict with the language and purpose of anti-retaliation provisions which is to maintain unfettered to statutory remedial mechanisms, harms public interest by deterring others from filing a charge(s).

The district court ruled:

> *"Plaintiff asks the Court to (1) deny the costs which the Clerk of the Court taxed to plaintiff and (2) reconsider her claims of discrimination based upon all of the evidence. Defendant responds that it is entitled to the costs awarded under Fed. R. Civ. P. 54(d). Defendant also points out that the law of the case prevents plaintiff from re-litigating her prior claims. (citation omitted)*
>
> *For substantially the reasons set forth in defendant's response, the Court finds that plaintiff 's Motion for Review(Doc.# 114) filed December19, 2005 should be and is hereby* ***OVERRULED.*** *(Vratil, Docket #: 116).*

The *Kansas* district court's action infers the awarding of costs and errs in its findings in violation of prohibited 'civil or criminal reprisal serving to deter' protected by NO FEAR. Such action serves as
direct evidence of prohibited actions of retaliation as proscribed by the NO FEAR ACT.

5 C.F.R.724 precludes claims and taxation against federal employees under the NO FEAR ACT. 5 C.F.R.724.103 states *"All*

reimbursements to the Judgment Fund covered by the NO FEAR ACT are expected to be fully collectible from the agency."

Management Directives re: Retaliation provisions prohibit *"civil charges that are likely to deter reasonable people from pursuing their rights of protected activity and undermines the effectiveness of EEO statutes and conflict with the language and purpose of anti-retaliation provisions."* which such taxation inflicts.

SUMMARY

Peculiar to this matter, Petitioner has remained employed by Respondents' when allowed with the exception of work-denial and other actions by Defendants before the court. This, in spite of The United States' Postal Service's notoriety of termination, dismissals, harassment and retaliation against employees who seek redress. The Postal Services appears to have become so self-assured of its status 'beyond the law' that as in these instances of unlawful actions of perjury and pretext being blatantly displayed. Its status is affirmed by the courts failure of judicial redress. As Petitioner's retirement is at stake, she continues to suffer ongoing, continued and present retaliation by infringement of rights, harassment, improper handling of job abolishment(2006) which increases with each failure of the court to enforce the law and render justice.

Ultimately and without regard by whom the evidence was supplied, the Court had judicial responsibility to consider all evidence and to do so liberally as purported for Pro Se petitioner. The Court failed to do so evidenced by judicial statements:

"... and does not include any affidavits, declarations or other materials in compliance with Rule 56c), Fed. R. Civ. P."(Vratil, Docket #: 89. Page 4)

which were provided. *AND*

"Plaintiff purports to dispute many of defendant's ***factual*** *(emp. added) statements, but she does not refer to portions of the record on which she relies. Accordingly, the Court deems such facts as admitted. (Vratil, Docket# 89 Page 3)"*

while acknowledging existence of such refutation by citing Petitioner:

> *"WHEREAS, Plaintiff asks this Court to* ***read*** *the seventy-nine(79) page appeal inclusive of exhibit list and*

corresponding exhibits with continued arguments to render justice.(Vratil, Docket #: 89. Page 15)"

Petitioner contends the implausibilities, inconsistencies, incoherencies and evidence of perjured pretext were sufficient to establish an admission of guilt of discrimination.

That Defendants adjusted their prooffered rationale through perjured; (*Defined: 18 U.S.C. 1623 "having taken an oath before a a competent tribunal(EEOC hearing transcripts), officer (depositions[3]) written testimony, declarations, depositions and certificate (affidavits) authorized by the laws of the United States(2) willful subscribes as true any material matter known not to be true is guilty of perjury.(Petitioner Request En Banc, Page28);* testimony. For each occurrence before the Court, Defendants falsified testimony, documents, national regulatory manuals, standard operational procedure and false rationale for each act were refuted by material evidence. Had presented evidence been considered by lower courts, the same sufficiently serves as 'admission of guilt' by Defendants unlawful, discriminatory, retaliatory actions. The court's failure to adjudicate based on the evidence affirms the Postal Service's perception that it is beyond and/or above the laws which regulate non-federal entities and affords it the continued impugning of Petitioner's rights through utilization of all other federal agencies and their powers against Petitioner(s) to evidence their power inclusive of unlawful actions which non-federal entities are not afforded. The Tenth Circuit ruled contrarily in this matter against a federal agency to its established precedents: Miller v. Eby Realty, 03-3307,04-3076 (10th Cir. 01/26/05), the Court defined the existence of pretext:

" *when an employer does not honestly represent its reasons for terminating an employee (source citation omitted). (pretext is defined as (1) "An ostensible or proffered purpose; an excuse" and (2) "An effort or strategy intended to conceal something").*

This is evidenced by the various falsifications and blatant excuses(i.e. pretext) of mis-perception supplied for each instance of

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[3]Official/Sealed depositions submitted to the Court were returned to Petitioner by the Court.

the discriminatory, retaliatory action: (i.e. work-denial, non-ASP promotion, non-promotion consideration, et al.) taken against Plaintiff.

Petitioner asserts in accordance with the Tenth Circuit's Miller conclusion(s): "*it is permissible for the [factfinder] to infer the ultimate fact of discrimination from the falsity of the employer's explanation*" Reeves, 530 U.S. at 147 *and that such inference is consistent with the general principle of evidence law that the factfinder can consider the dishonesty about material fact as affirmative evidence of guilt.*

Each of the issues/questions presented to this Court are of extreme significance to the enforcement and interpretation of governing laws and precedents as established.

The handling of this matter is graver and bearing of greater importance than the wrongful defeat of justice against Petitioner. The Court's decision(s) may affect all future and present cases

Petitioner seeks justice on the specifics of the cases before the Court. Praying the Court's consideration in avoidance of the lower courts establishment of new and erred precedents resultant of pro se representation affecting the validity, enforcement and protected civil rights of future petitioners with or without counsel. It was never Petitioner's objective to be utilized as a means to defeat the letter and intent of protections firmly established by the cited laws, The Constitution, Bill of Rights and legal precedents.

CONCLUSION

The Tenth Circuit ruled in Borowski 63 F. 3d at 138. *Defendant employer;* a non-federal entity; *is **obligated** to demonstrate it (has) complied with the various statutory duties placed upon it most esp. the duty to provide reasonable accommodation."*

Contrary to the Court's holdings that federal agencies need exemplify compliance with laws: *Federal employers are charged with greater duty than federal grantees or private employers* Southwestern Comm. College v. Davis 442 U.S. 397,410 (1979). Fedro v. Reno 21 F.3d 1391, 1938 (7th Cir. 1994) , the 7th Circuit ruled: *For federal employers, therefore non-discrimination requires more than mere equal treatment of disabled employees and job applicant and encompasses affirmative duty to meet the needs of the*

disabled workers and to broaden employee opportunity. Citing Shiring v. Runyon, 90 F.3d 827-32 (3rd Cir. 1996), the 10th Circuit noted in Woodman v. Runyon, 96-4104 (12/24/97) *"that the United States Postal Service"* Petitioner's employer and present Respondent: *"**most certainly** had duty based on its existing policies to attempt to reassign [Woodman] as part of its duty to provide reasonable accommodation"* **and** *"had a duty to reassign pursuant to its existing policies pertaining to workers injured on the job".*

The 10th Circuit applied and cited a 9th Circuit's interpretation of employer's duties under the Rehabilitation Act: *Section 501 and duty to reassign under 1992 amendments are mandates with which federal employers are obligated to comply.* In this matter, Appellees failed to meet their burden of proof Buckingham v. U.S. 998 F. 2d 735,741-42 (9th Cir.). The court failed to uphold its own precedents while ignoring Respondent's pretext and ***duty to reassign workers injured on the job.*** In so doing, both courts erred in failure to apply 12112(2)c) under the Act(s) as was applicable. AND that the source of pretext of work denial was unlawful Title 42, Section 12112(d)(1)(a) prohibiting medical examinations and inquiries by Title 42, Section 12112.4(A) and 5(A) .10th Circuit ruled that *"An individual rejected from a job because of myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability... whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. (citing 29 C.F.R. pt. 1630, App. 1630.2(l).* The Court's ruling affirms coverage of Petitioner under American with Disabilities and Vocational Rehabilitation Acts as Petitioner's filing was in compliance.

The lower courts erred in ruling in favor of Summary Judgment for Defendants. On each count, evidence refuting Defendants claim and prooffered reason was filed with the court. Said evidence: sworn testimony, affidavits, national governing regulations and explanation procedure by sworn expert testimony by its Personnel Manager refutes allegations, divergence from procedure by Defendants' employees and Plaintiff's former EEO counselor in contravention of regulatory

procedure followed adhered to by other employees of Defendants without said knowledge of protected activity, et cetera.

In consideration of such evidence the lower courts' ruling is in error and conflicts with established laws and precedents. Inclusive of The Acts, further conflict exists as ruled by the 10th Circuit Court in Simms v. Okla. ex rel Dep't of Mental Health and Substance Abuse Servs, 165 F.3d 1321,1326 (1999):*Summary judgment is only appropriate if there is no genuine issues of material facts and the movant is entitled to judgment as a matter of law.;* and Allen v. Muskogee, Okla. 1191 F.3d 837,839(1997) *:A disputed fact is material if it might affect the outcome of the suit under the governing laws and the dispute is genuine if the evidence is such that a reasonable jury could return a verdict* - inference applies.

Petitioner has been subjected to this travesty of justice for eight(8) years and seeks - be it within this Court's authority to - award Petitioner's requested judgment without further delay. After 18+ years toward retirement, Respondents' continued actions - unfettered due to the failure of justice - mandates Petitioner's escape from the hostile work environment at the loss of retirement benefits, wages of employment denial/on-the-job injury and bonuses excluded from, income reduction, retirement privileges and further losses owed by Respondents'. . FURTHER, it is noted that the lower courts ruling of Respondents' unlawful tampering, failure to deliver, delay of delivery, monitoring, et al of Petitioner's mails as moot is in error. Use of the law's applicability in that manner indicates that violation requires that the act not yet be committed and/or that the unlawful offense having already transpired is without relevance. Were this the method of application of the law, it stands to reason that many incarcerated prisoners would be released as the offense having already occurred. could render such as **moot.** Indeed the lower court's failure to reprimand leads to failure to deter this aberrant and unlawful behavior by Respondents' whose most recent known offense was exhibited through receipt of the mailing from this **Supreme Court as fully opened.** Though it may be the case, it is difficult to imagine this Court would so handle such documents. Petitioner request Court order All other such actions

perpetuated by Respondents' federal status and affording action against Petitioner resultant of this protected activity be ceased

AND THAT Judgment of Kansas U.S. District Court, Appeal findings of the Tenth U.S. Circuit Court be reversed (remanded) with language ensuring these lower courts enforce the laws and application of 'admission of guilt' finding in favor of Petitioner. Petitioner seeks the authority of this United States Supreme Court as the lower courts have evidenced to date their unwillingness and/or inability to enforce governing laws against the United States Postal Service.

Petitioner requests this Court's judicial intervention to convey to millions of employees of the United States Postal Service and residing judiciary that the laws of the United States apply to this entity and justice sought by legal method can be obtained. Such bold action by this Court will aide in ridding Respondents' of the earned, negative, notorious depiction affixed to 'postal' by demonstration that recourse through the justice system is available and can prevail. DULY noted, the lower courts had a duty to render judgment in favor of Plaintiff in accordance with Fed. R. Civ.Proc. 56 c) had Plaintiff's evidence been considered. Further, Defendants' *unconclusory, unsupported allegations did not create an issue of fact Salehpoor v. Shahinpoor, 358 F. 3d 787,789(10th Cir.)* Summary judgment was in violation by the lower courts ignoring and/or exclusion - as rulings imply - of filed evidence. Plaintiff met the judicial standard to survive summary judgment under Fed.R.Civ.Proc. 8(a)(2), in accordance with *Swierkiewicz v. Sorema, N.A. 534 U.S. 506(2002): An employment discrimination case need not contain specific facts establishing a prima facie case under the McDonnell Douglass framework.* Ruled by the court in TransWorld Airlines Inc v. Thurston 469 U.S. 111,121 Plaintiff's production of direct evidence of discrimination should have prevailed by award. It is incomprehensible that such blatant acts of unlawful practice be upheld by the judicial system and its officers assigned to enforce such violations. The Kansas Court's action in violation of The NO FEAR ACT OF 2002 exemplifies violation of all other THE ACTS. Indeed, were this case not supported by facts in evidence of blatant 'inconsistencies, implausibilities, and contradictions' failure to consider

Petitioner's evidence could escape the due process which justice blindly is to afford. Judicial handling of this complaint appears errantly greatly influenced by representation; Pro Se vs. assistant USAG; thereby violating a basic and inferred constitutional principle affording self-representation. Such action serves to deter violated parties from seeking and/or obtaining judicial recourse as guaranteed. Further it deters the ability of the ordinary citizens to pursue justice/rights/protections from federal agencies with their unlimited resource of pre-paid/contract counsel through the United States Attorney's office. In so doing, the court immunizes federal entities from judicial corrective action; in essence placing them ***above*** the law and beyond the purview of any court. Thus, circumventing the purpose, intent and protections which provided guarantees by law are to ensure.

Be it noted, that Petitioner by no means set out to achieve any grand goals but was simply in search of purported justice governing laws are to afford. Petitioner's plea for justice is supported by evidence for each claim. Stunned by the lower courts' decisions, it is well appreciated that the Supreme Court would be unable to act in protection of these rights without notification by WRIT.

Praying application of this Courts' unanimous ruling IN RE Haines v. Kerner 404 U.S. 519(1972): *"a pro se complaint, however inartfully pleaded must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."*

SO BE IT, HEREWITH HUMBLY SUBMITTED,

Kathy V. Williams
Pro Se Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Kathy V. Williams,
Plaintiff

v. CIVIL ACTION
NO. 02-2568-KHV

John E. Potter, Postmaster General,
United States Postal Service,
Defendant

MEMORANDUM AND ORDER

Kathy Williams brings suit against John E. Potter, Postmaster General of the United States Postal Service("USPS") alleging that the USPS discriminated against her on the basis of race, sex, religion and disability and retaliated against her for protected activity in violation of Title VII of the Civil Rights Act of 1964(Title VII), 42 U.S.C. §2000e et seq as amended and the Vocational Rehabilitation Act of 1973 ("Rehabilitation Act"), as amended 29 U.S.C. 791, 794. This matter comes before the Court on Defendant's Motion For Summary Judgment (Doc.#44) filed January 20, 2004. For reasons stated below, the Court finds that defendant's motion should be sustained in part.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate *if* the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56c, Fed.R. Civ.P.; accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242,247(1986); Vitkus v. Beatrice Co., 11 F.3d 1535,1538-39(10th Cir. 1993). A factual dispute is "material"

only if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252.

The moving party bears the initial burden of showing the absence of any genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317,323 (1986); Hicks v. City of Watonga, Okla., 942 F.2d 737,743 (10th Cir. 1991). Once the moving party meets its burden the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238,1241 (10th Cir. 1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus. Inc. v. Arvin Indus., Inc. 939 F.2d 887,891 (10th Cir. 1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. See Applied Genetics, 912 F.2d at 1241.

The Court must view the record in a light most favorable to the party opposing the motion for summary judgment. See Deepwater Invs., Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105,1110 (10th Cir. 1991). Summary judgment may be granted if the nonmoving party's evidence is *merely colorable or is not* significantly probative. See Anderson, 477 U.S. 250-51. "In response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial. Conaway v. Smith, 853 F.2d 789,794 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence present a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. 251-52.

FACTS

The following acts are either uncontraverted or construed in light most *favorable* to plaintiff.[1]

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[1]D. Kan. Rule 56.1 provides as follows:
b) Opposing Memorandum

The USPS hired plaintiff in 1987, and she continues to work for the USPS. On May 22, 1994, plaintiff filed an Equal Employment Opportunity complaint ("EEO complaint") with the USPS ("Complaint No. 1085-94") alleging discrimination on account of race (black), color(brown), national origin(African-American) and sex(female). Williams Dep. 113-14, Williams Dep. Ex. 4. On March 13, 1996, plaintiff signed an EEO Settlement Agreement which resolved Complaint No.1085-94 in exchange for a payment of money. The Settlement Agreement stated in part as follows:

I fully understand that by agreeing to this settlement, I waive my rights to any further appeal of my allegation(s) through

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(1) A memorandum in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contend a genuine issue exists. Each fact in dispute shall be numbered by paragraph, shall refer with particularity to those portions of the record upon which the opposing party relies, and if applicable, shall state the number of movant's fact that is disputed.

(2) If the party opposing summary judgment relies on any facts not in movant's memorandum that party shall set forth each additional fact in a separately numbered paragraph, supported by references to the record, in the manner required by subsection (a) above. All material facts set forth in this statement of the non-moving party shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the reply of the moving party.

D.Kan. Rule 56.1

Plaintiff purports to dispute many of defendant's factual statements, but she does not refer to portions of the record on which she relies. Accordingly, the Court deems such facts admitted.

the EEO process, I further state that this agreement did not result from harassment, threats, coercion or intimidation.

I am fully aware that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process is binding on both parties.

Should I believe the Postal Service has failed to adhere to the stipulation contained in this agreement for any reason not attributable to my acts or conduct, I must notify the EEO Compliance and Appeals Coordinator located to my area, in writing, of the alleged noncompliance within 30 calendar days of the alleged noncompliance.

Management agrees to the aforementioned stipulation solely in an effort to resolve the complainant's allegation(s), and this agreement should not be construed as an admission of discrimination or wrongdoing on the part of any official of the U.S. Postal Service.

Whitworth Decl. Attachment 1. After 1994, plaintiff lodged *seven additional* EEO complaints on four dates: No. 4-I-640-0092-97 on April 16,1997; Nos. 4-I-640-0014-98; 1-I-641-0059-97, 4-I-640-0013-98 and 4-I-640-0015-98 on November 3, 1997; No. 1-I-643-0016-98 on December 3, 1998 and No. 1-I-643-0006-99, April 19, 1999. See Complaint Ex. A.

Non-Placement In the ASP Program

In early 1997, the USPS implemented the Associate Supervisor Program("ASP") to identify strong supervisor candidates in the greater Kansas city area and train them to become associate supervisors. In late 1997, the USPS had 26 vacancies for the ASP program. To apply for the ASP, an employee had to submit a Form 991 application, take a written examination, submit a writing sample and interview with the review board. The interview consisted of nine prepared questions designed to solicit information to rate the candidate in seven areas; leadership, decision making, human relations, verbal communications, safety, labor relations and reasoning. In approximately October 1996, plaintiff applied for the ASP. In early to mid-October, R. Dean Alberti, who was not plaintiff's current immediate supervisor,

volunteered to prepare an initial level supervisor evaluation for plaintiff's ASP application. Al Kostus, who had supervised plaintiff, *later* completed an evaluation for plaintiff. Plaintiff *could not use it* when she applied for the APS, however, Kostus was not a manager at that time.

The ASP review board comprised Bruce Sanders(Manager, Distribution Operations, Kansas City,Missouri), Pat Barba(Manager, Customer Service Operations, Kansas City, Missouri) Rosemary Goldblatt (Human Resource Specialist, Kansas City, Missouri) and John Coolidge (Postmaster, Kansas City). On March 13, 1996, Bruce Sanders had signed the Settlement Agreement regarding EEO Complaint No. 1-I-641-1085-94. None of the ASP review board members *knew* of plaintiff's EEO activity.

The ASP review board initially reviewed the applications and selected 17 candidates, including plaintiff, for interview. Eligibility for an interview did not mean that the candidate was guaranteed to be selected for the ASP program.[2] After consulting with the ASP Coordinator, the review board reviewed the applications a *second time,* to expand the application to a number large enough to fill 26 ASP vacancies. The review board chose *ultimately 50* applicants to interview.

Plaintiff performed *poorly* at her ASP interview.[3] The review

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2 Plaintiff attempts to controvert defendant's statement of fact on this matter with the statement: "Controverted as evidentiary of Defendant's pretextual reasoning." Plaintiff alleges the defendant falsified the selection matrix by representing plaintiff as rated below applicants who were not among the initial pool of 17 applicants. Plaintiff *does not cite* recorded evidence for these allegations.

3 Defendant cites *evidence* that during her interview plaintiff was emotional to the point of tears. In

board rated her performance as "minimal" in six of the seven interview criteria, and plaintiff had one of the lowest interview scores. Plaintiff testified that her performance during the interview was "passing" and "acceptable." *She also stated* that "I don't believe my best was required." Plaintiff also admitted, however, that she had no basis on which to compare her interview performance and that of other applicants. Williams Dep. 241-42. Further, on February 17, 1997, plaintiff stated in a letter to USPS Regional Director William Brown that "I had explained to the interviewers at the time of the interview that I was not at my best due to personal reasons without expounding (i.e. death the day before, two additional burdens and one of the first questions asked during the interview process". Williams Dep. Ex. 10 at 043.18.

The review board *compiled* each candidate's scores from the written examination, written applications, supervisor evaluations and interviews. The board then selected the 26 candidates with *highest* composite scores for the ASP.

Alleged Disability Claim

On December 13, 1997 *plaintiff injured her* left elbow. She sought medical treatment from *Dr.* Louis Orlando, who referred her to Dr. Alexandra Strong, an orthopedic specialist, on March 19, 1998. Dr. Strong treated plaintiff from March of 1998 through November of 1999. Dr. Strong prescribed work restrictions of a five pound lifting limit. No later than April 28, 1998, the USPS assigned plaintiff to light duty work. Plaintiff had a light duty designation from April through September of 1998. During that period, she worked her then-current job as Air Records Processor with accommodations that accounted for her work restrictions.

In a letter to Dr. Strong on August 30, 1998, plaintiff stated that "my employer ha(s) not yet assumed responsibility for this on-

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response, plaintiff notes that some review board members did not remember that she cried during her interview, while others did not recall any crying or personal problems. Whether plaintiff cried during her interview *does not appear to be material* to the issue before the Court.

the-job injury." In the same letter, plaintiff wrote as follows:

Additionally, I requested to be relieved of duty. I have utilized minimal sick leave and/or days off/after-work-hours for the treatment of this injury. After complaining of my back hurting again, I did not perform my duty. As was the case during the first week of my vacation, my aches and pains were markedly improved until I returned to duty. Coupling this with the new pain of my left shoulder blade resultant from the MRI this is overly excessive. I wish to do simple things like clean my house which I can not do anticipating the pain of going to work.

Strong Dep. Ex. 4 at STRONG 0058.

In early September of 1998, Jerome Barnes, Acting Manager of District Operations, asked plaintiff to *update* her medical documentation because plaintiff's supervisor, Jerome Greene had *told* him that plaintiff was taking unscheduled breaks. On September 4, 1998, Dr. Strong *increased* plaintiff's work restrictions to include (1) no lifting over five pounds, (2) no climbing more than (blank) times per hours (3) no pushing or pulling more than zero pounds per day (4) eight maximum hours to work per day and (5) no repetitive activity, pushing, pulling, lifting or reaching away from body. Dr. Strong testified that she intended these restrictions only for the left side of plaintiff's body, but ***her*** light duty form did not specify left side only. On September 4, 1998, plaintiff gave the light form to Barnes who asked plaintiff for medical clarification of her work restrictions. Barnes Dep. at 48-49,61-62.

On September 8, 1998, Dr. Strong examined plaintiff's arm and shoulder. Dr. Strong observed that plaintiff's was "very tender" in her parascapular muscles[4], and stated that "I think she has some spasm and soreness." Dr. Strong concluded that plaintiff would benefit from physical therapy, and placed her on *more* work restrictions. Strong Dep. Ex. 4 at STRONG 0073.

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[4] The parascapular muscles are the upper back muscles between the shoulder blade and spine.

On September 11, 1998, Dr. Strong wrote Barnes a letter which stated as follows: RE: Kathy Williams The above patient is restricted from reaching away from her body repetitively. This means that she cannot pick up or draw toward or push items away from her body. "Reaching is called abduction or moving away from the body." Strong Ex. 4 at STONG 0014. After he read this letter, Barnes concluded that plaintiff could not **continue** to perform the job functions of an Air Records Processor, which *required* repetitively reaching away from her body. Barnes *attempted* to locate available work in the Air Mail Center, where plaintiff was working and contacted the local office to see it had work available with plaintiff's *new* work restrictions. *No* work was available,so Barnes sent Williams home and *told her not to report* for work until her restrictions changed. On September 22, 1998, plaintiff sent a letter to Robert W. Barnes,Office Of Worker's Compensation of the United States Department of Labor, stating that "[my] employer repeatedly asks whether my restrictions have changed when I call to inquire if I may report." Strong Ex. 3 at STRONG 0010. On November 24, 1998, Dr. Strong examined plaintiff and concluded that although plaintiff was feeling better, she should continue with the *same work restrictions*.

The USPS considered plaintiff's work restrictions temporary and the *record indicate* that her impairment was in *fact temporary*. Between September of 1998 and January of 1999 the USPS was *not aware* that plaintiff's prescribed work restrictions were limited to one arm. Between September 11 and December 28, 1998, Dr. Strong wrote letters specifying the same work restrictions for plaintiff as in the letter of September, 1998. None of the letters specified that the work restrictions were limited to plaintiff's left arm. On January 20, 1999, Dr. Strong examined plaintiff ,concluded that her condition had improved, and issued new work restrictions as follows:

RE: Kathy Williams. The above patient is on restricted duty with lifting restrictions of 17 pounds. She is to work only 40 hours a week. The patient has advised that the post office has refused to *return her* to restricted duty over the past several months.

Strong Dep. Ex. at STRONG0044. Plaintiff returned to work shortly after Dr. Strong modified her work restrictions.

Supervisor, Customer Services, Olathe, Kansas

On April 8, 1997, the USPS issued a vacancy announcement for the position of Supervisor Customer Services at the Olathe Post Office in Olathe, Kansas. The announcement stated: "How TO APPLY (Individual Announcement Procedures): Complete Form 991 and return DIRECTLY to your immediate supervisor before the closing date shown above."[5] Williams Dep. Ex. 21; Williams Dep.. 336-37. The Form 991 stated: "If you are applying for specific a position, complete pages 1-4 of this form and submit the completed form to your supervisor, who will complete the evaluation for each requirement. If you want a copy of the evaluation, check the box at left." Plaintiff checked the box with a handwritten "x". Williams Dep. Ex. 22 at 066.

Plaintiff did not submit the completed Form 991 to her immediate supervisor, and *she did not ask* her then-current immediate supervisor to prepare a supervisor's evaluation for her application for the Olathe position. Instead, she attached to her application materials an evaluation which her former supervisor, Bruce Sanders, had written for a prior job application (no.96-55). Sanders had completed that evaluation on August 20, 1996 - about eight months before plaintiff submitted her application on April 22, 1997.

The review board for the Olathe position comprised Sara Wilson(Postmaster, Baldwin City, Kansas), Edward Keith Coleman(Operations Support Specialist) and Jean Moore(Supervisor, Customer Services Operations, Shawnee

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5 The USPS Handbook section which governs individual announcement application procedures requires employees applying for an initial level supervisor position to submit Form 991(job application) "to their immediate supervisor for evaluation." EEO Case No. 4-I-640-0013-98, Ex. 34; EEO Tr. 154-55(Wilson).

Mission, Kansas) The review board members did not recommend plaintiff for the Olathe position *because her supervisor evaluation was not current* and plaintiff had not received a consolidated rating as one of the most qualified candidates. [6] Moore had *investigated* plaintiff's EEO complaint in 1994, but when she participated on the review board for the Olathe position, she *did not recall* plaintiff's EEO activity. Moore had counseled hundreds of individuals on EEO complaints and formally processed even more cases than she had counseled.[7] Moore Olathe Aff.: Williams Dep. Ex. 4. Wilson and Coleman did not know of plaintiff's prior EEO activity.

Customer Supervisor, Shawnee Mission, Kansas

On April 8, 1997. the USPS issued a vacancy announcement for the position of Customer Services Supervisor at the Shawnee Mission Post Office in Shawnee Mission, Kansas. As with the Olathe position, the announcement stated: "How TO APPLY (Individual Announcement Procedures): Complete Form 991 and return DIRECTLY to your immediate supervisor before the closing date shown above."[8] Williams Dep. Ex. 26; Williams

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6 Wilson had been trained that an important part of the application was a timely supervisor's evaluation. EEO Tr. 152(Wilson) see also EEO Tr. 149.

7 Plaintiff asserts that Moore's testimony was inconsistent, but the Court does not perceive any material inconsistencies.

8 Again, The USPS Handbook provides that employees applying for an initial level supervisor position to submit Form 991(job application) "to their immediate supervisor for evaluation." EEO Case No. 4-I-640-0013-98, Ex. 34; EEO Tr. 154-

Dep.. 352-53; Moore Dep. Ex. 4 Plaintiff submitted. the Form 991 which stated: "If you are applying for specific a position, complete pages 1-4 of this form and submit the completed form to your supervisor, who will complete the evaluation for each requirement. If you want a copy of the evaluation, check the box at left." Plaintiff checked the box with a handwritten "x". Williams Dep. Ex. 27 at 100. Plaintiff did not submit the completed Form 991 to her immediate supervisor. Further instead of asking her then-current immediate to supervisor prepare an evaluation, she copied the Bruce Sanders' evaluation for the prior job application (no.96-55) and attached that evaluation to her application materials for the Shawnee Mission position. Sanders had prepared plaintiff's evaluation on August 20, 1996, and plaintiff submitted her evaluation for the Shawnee Mission position on April 22, 1997.

The review board for the Shawnee Mission position comprised chairperson Charles Pennewell(Manager, Customer Service Operations, Prairie Village branch in Shawnee Mission, Kansas), Jeffrey Omang(Manager, Customer Services, Leawood Branch in Shawnee Mission, Kansas) and Jean Moore(Supervisor, Customer Services Operations, Shawnee Mission, Kansas). The review board members did not recommend plaintiff for the position *because her supervisor evaluation was not current.* As noted earlier, Moore had been the investigator for plaintiff's EEO complaint in 1994. When she participate as a member of the review board for the Shawnee Mission position, however, Moore did *not recall* plaintiff's prior EEO activity. Pennewell and Omang did not know of plaintiff's activity *during* the review process.

Air Records Processor Position

In 1997, plaintiff applied for and qualified for the position of Air Records Processor. Barbara McCrary, a USPS human resources specialist who was responsible for internal bidding for positions, was *mistakenly informed* that plaintiff did not qualify

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55(Wilson).

for the position. In August of 1997, the USPS awarded the position to another employee. The *following month*, the USPS discovered its error and immediately placed plaintiff in an Air Records Processor position.[9] McCrary knew nothing about plaintiff's *prior* EEO activity.

Plaintiff's Use of Leave

On August 9, 1998, plaintiff submitted a Form 3971(a request for or notification of absence) on which she requested three *different* types of leave: "COP"(continuation of pay), sick and other. *Because* the form requested three different types of leave, Jerome Greene, plaintiff's supervisor *denied* the request and told plaintiff to re-submit the form with only one block checked to indicate the type of leave that she was requesting.[10]

On August 11, 1998, two days after she applied for leave, plaintiff was absent. When she returned to work, Greene specifically instructed her to submit a Form 3971 requesting leave for August 11. Plaintiff refused. Barnes, acting manager of

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In *November 1999*, during payperiod 24, the USPS paid plaintiff *$3,576.77* as out of schedule pay for pay periods 16 through 21 of 1997 in connection with an *EEO complaint*. Decl. of Lonnie Beattle at 3-4. Payperiod 16 thtough 21 of 1997 correspond to July through October of 1997, the time for which plaintiff had qualified for the position of Air Records Processor, but had not yet been placed in the position

On numerous occasions, plaintiff submitted *defective* Forms 3971 in which she requested Continuation of Pay("COP"), a category of leave for which she did not qualify because she did *not at the time have a recognized on-the-job injury*. *Greene* had previously required plaintiff to resubmit a Form 3971 because she had requested COP leave for which she did not qualify.

operation then asked her to change the Form 3971, and plaintiff replied that she had "sworn to God"that she would not sign another Form 3971. On approximately August 26, 1998, *Greene* issued plaintiff a Letter of Warning for being absent without leave("AWOL") ON August 11, 1998. Barnes Dep. 132-33; Barnes Dep. Ex. 8 at 25-26 (*unsigned* copy). Pursuant to a grievance process, on September 10, 1998, Barnes directed that the warning letter be expunged from plaintiff's record effective January 1, 1999, if she had no further AWOL-related discipline by that date. Plaintiff fulfilled that condition and the USPS expunged her warning letter.

Clerk Stenographer Position

In June of 1997, plaintiff applied for the position of Clerk Stenographer. She took the required examination on June 19, 1997. Barbara McCrary, who as responsible for posting, bidding and awarding jobs administered the exam. On June 29, 1997 plaintiff received a *rating* of "ineligible" for the Clerk Stenographer position.

Stamp Distribution Clerk Position

In January of 1999, the USPS solicited applications for the position of Stamp Distribution Clerk (Notice 99BQ01). The vacancy notice stated that each applicant was responsible for ensuring that the application reached the Assignment Desk, Room 567, General Post Office not later than 4:00p.m. on January 28,1999. The USPS did not consider untimely applications. Plaintiff applied for the Stamp Distribution Clerk position but her application was *received on February 3, 1999* - after the deadline. On February 3, 1999, Human Resource Specialist Ofenie Roper sent plaintiff a letter which stated that her application was late and that she was therefore ineligible for the position. EEO Tr. 732-33; Investigative File for EEO Case No. 1-I-643-006-99 at 88. As of August of 1999, Ms. Davila-Brownlee (fnu), who was the Human Resources Specialist responsible for filling the position was not aware of plaintiff's *prior* EEO activity.

Reduction of Plaintiff's Base Pay Due to Failure to Apply for

Available Positions.

Plaintiff worked as a Mail Processing Letter Sorting Machine Distribution Clerk ("letter sorting machine clerk") from September 1987 until July 18, 1997, when the USPS abolished her position because it was eliminating letter sorting machines. Plaintiff was at pay level 6 when the USPS eliminated her position. The USPS provided letter sorting machine clerks protections against a decrease in pay level if they met certain conditions and gave them the right to retreat to the first available Level 6 position. Beginning July 19, 1999, plaintiff received saved grade protection. She was entitled to pay protection until she failed to bid or apply for any posted Level *6(or higher)* full time assignment or until she changed to a lower level position. In *October 1997*, the USPS posted a level 6 PSDS Technician position for which plaintiff did not apply. In *February of 1999*, the USPS realized that plaintiff was not entitled to continue saved grade status because she had not applied for the PSDS Technician position. It therefore terminated plaintiff's saved grade status and reduced plaintiff's pay to Level 5.

ANALYSIS

Plaintiff claims that defendant discriminated against her on the basis of sex, race, religion and disability and that defendant retaliated against her for filing EEO complaints.[11] Specifically,

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It is difficult at first blush to discern the exact nature of plaintiff's sex and race discrimination claims. The pretrial order factual contention sections recites the allegations in plaintiff's seven EEO complaints beginning in 1997, and states that each adverse employment action or failure to promote was "based on plaintiff's black, African-American race, female sex and retaliation for prior EEO activity." Pretrial Order (Doc. #39) filed December 16, 2003 at 10-13. By contrast, in plaintiff's theories of recovery, the pretrial order includes for each EEO complaint the statement that "[p]laintiff's legal theory for her claims for sex and

race discrimination is that her prior protected activity for which she made a recovery was based on race and sex discrimination and therefore her present claim for retaliation for prior protected activity would again include a renewal claim for that same sex and race discrimination." Pretrial Order (Doc.#39) at 23-26.

In its summary judgment motion defendant asserts that plaintiff's sex and race discrimination claims seem to revive a claim based upon conduct set out in plaintiff's 1994 EEO complaint. A review of the entire pretrial order, however, reveals that plaintiff makes no claim of race or sex discrimination based upon the facts underlying her EEO complaint of 1994. In the "ISSUES" section of the pretrial order under "Plaintiff's Second Theory of Recovery i.e. Disparate Treatment and Discrimination based upon race, "plaintiff sets out the elements of a race discrimination claim. In that same section, plaintiff lists as an issue of fact the following question: "[w]as race a motivating (...continued)(...continued)factor in defendant's decision to deny plaintiff's applications to the Associate Supervisor Program; Supervisor of Customer Service at the Post Office of Shawnee Mission and Olathe, Kansas; the Clerk Stenographer's position and Stamp Distribution Clerk?" Doc. #39 at 33. Similarly, under "Plaintiff's Fourth Theory of Recovery i.e. Disparate Treatment and Discrimination based upon sex, "plaintiff sets out the elements of a sex discrimination claim and lists as an issue of fact the question: "[w]as plaintiff's gender a motivating factor in defendant's decision to [reject her application for certain positions and to take adverse action against her]?" Id. at 38. Liberally construing the pretrial order, the Court finds that plaintiff has set forth claims of disparate treatment based on race and sex as to the conduct set out in her seven EEO complaints.

Plaintiff's Response to Defendant's Motion for Summary Judgment (Doc.#52) filed February 8, 2004.

To prevail on her claims of discrimination, plaintiff must establish that her race, religion, sex *or* prior EEO activity was a determining factor in the challenged decisions. See Greene v. Safeway Stores, Inc.,98 F.3d 554,557 (10th Cir. 1996)(citing Lucas v. Dover Corp., 857 F.2d 1397,1400 (10th Cir. 1988). She may meet this burden by direct or circumstantial evidence. Because plaintiff has *offered no* direct evidence of discrimination, she must rely upon circumstantial evidence, ant the Court therefore applies the burden-shifting framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792,802-04, and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56(1981). See Kendricks v. Penske Transp. Servs., Inc., 220 F.3d 1220,1225(10th Cir. 2000). Under this approach, plaintiff initially bears the burden of production to establish a prima facie case of discrimination. See McDonnell Douglas, 411 U.S. at 802(racial discrimination); Burdine, 450 U.S. at 252-56(sex discrimination); Thomas v. Nat'l Ass'n of Letter Carriers, 114 F.3d 1149,1155(10th Cir. 200)(religious discrimination); Wells v. Colo. Dep't of Transp., 325 F. 3d 1205,1212(10th Cir. 2003)(retaliation). If plaintiff establishes a prima facie case, the burden shifts to defendants to articulate a facially nondiscriminatory reason for its actions. See Reynolds v. Sch.Dist. No.1, 69 F.3d 1523,1533(10th Cir. 1995). If defendant articulates a legitimate nondiscriminatory reasons the burden shifts back to plaintiff to present evidence that defendants profferred reason is pretextual, that is "unworthy of belief." Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1165 (10th Cir. 1998) (quoting Randle v. City of Aurora, 69 F.3d 441,451(10th Cir. 1995).

A plaintiff may show pretext by demonstrating "such weakness, implausibilities, inconsistencies or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." Morgan v. Hilti., 108 F.3d

plaintiff alleges that because of her sex, race, religion,disability and EEO complaints, defendant (a) failed to promote her to positions for which she applied or attempted to apply;[12] (b) refused in August of 1998 to accept a leave slip; c) placed a letter of warning letter in her record on August 26, 1998, and (d) terminated her saved grade pay status in February of 2002. Defendant asserts that it is entitled to summary judgment because plaintiff has *waived her right to file* a race or sex discrimination claim based on EEO Complaint Number 1085-94 and because plaintiff has not set forth the prima facie elements of any claims of disparate treatment or retaliation. In response, plaintiff states as follows:

Plaintiff contends that controversy of the content of Defendants' Motion for Summary Judgment are in conflict with the evidence. Thereby, Defendants' Arguments and Authories are without bases and irrelevant.

Plaintiff attests to the undue hardship of responding to Defendants' Motion by extension and ask the mercy of the court of such argument is required in spite of the evidence presented.

Plaintiff asks the Court to consider "Uncontroverted" with stipulations, if grammatically incorrect to signify Points or sub-parts to be without controversy.

Plaintiff moves the Court to deny Defendants' Motion for Summary Judgment and remand the case for trial as scheduled.

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With regard to several positions for which plaintiff attempted to apply, but her application *was late*, plaintiff attempts to characterize defendant's actions as adverse employment actions. Defendant asserts that those are properly deemed failure to promote claim. The Court finds that the claims are failure to promote claims because the refusal to accept the application did not impact her then current conditions of employment.

1319,1323 (10th Cir. 1997)). The McDonnell Douglas burden shifting analysis generally applies to claims of disability discrimination also, but the inquiry is more complicated and the Court addresses it separately below. See Woodman v. Runyon, 132 F. 3d 1330, 1344 (plaintiff who asserts plausible accommodation bears burden of production which, if made, shifts burden of production to defendant to prove that the accommodation would pose undue hardship.)

I. Sex and Race Discrimination Claims

Defendant first asserts that it is entitled to summary judgment on all of plaintiff claims of sex and race discrimination. Defendant contends that the only basis for those claims is that plaintiff's claims of retaliation of prior EEO activity allow her to renew the claims of sex and race discrimination that she raised in EEO Complaint 1085-94 and expressly waived her rights to pursue further action on that claim. Plaintiff's settlement of EEO Complaint Number 1085-94 is binding. See 29 C.F.R. §1614.504(a)(1996). The Court agrees that even if the USPS retaliated against plaintiff for prior EEO activity, her prior allegations would not be revived. See Nat'l R.R. Pasenger Corp., v. Morgan, 536 U.S. 101,114,117(2002). The Court does not agree that in this case, plaintiff's only claims of sex and race discrimination are claims that she expressly waived and would have to be revived to be pursued. Reading the pretrial order as a whole it is clear that plaintiff alleges discrete, independent acts of race and sex discrimination in EEOC complaints which she filed *after* the settled EEO Complaint Number 1085-94. See infra, footnote 11. Defendant has not addressed the merits of these claims. The Court therefore finds that defendant is not entitled to summary judgment on plaintiff's claims of discrimination on the basis of race and sex.

II. Disability Discrimination Claims

Defendant next asserts that it is entitled to summary judgment on plaintiff's claim of disability discrimination under the Rehabilitation Act, 29 U.S.C. § 791, 794, because plaintiff cannot show that she was disabled within the statute. Defendant specifically argues that plaintiff's physical restrictions were both

temporary and regarded as temporary by the USPS.

The Rehabilitation Act incorporates the standards of the American With Disabilities Act(ADA), 42 U.S. C. §12101 et seq, including definition of disability. Under the ADA, a "disability" is (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or C) being regarded as having such an impairment." 42 U.S.C. §12102(2); Rakity v. Dillon Co., 302 F.3d 1152,1158(10th Cir. 2002). A major life activity is a "basic activity that the average person in the general population can perform with little or no difficulty." Rakity, 302 F.3d at 1158 (quoting Pack v. Kmart Corp., 166 F.3d 1300,1305(10th Cir. 1999), Major life activities include functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, sleeping, sitting, standing, lifting, reaching and working." Rakity, 302 F.3d at 1158 (quoting Doyle v. Okla. Heart Inc., 213 F.3d 492,495-96(10th Cir. 2000). Plaintiff bears the burden of demonstrating that she has an impairment that substantially limits a major life activity. See Toyota Moto Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 195(2002). In determining whether an individual is substantially limited in a major life activity, the Court considers three factors: (1) the nature and severity of the impairment;(2) the duration or expected duration of the impairment and (3) the permanent or long term impact of or resulting from the impairment. Id. Toyota Motor Mfg., 534 U.S. at 196 (citing 29 C.F.R. § 1630.2(j)(2)(i)-(iii). The be substantially limited in performing manual tasks the impairment's impact must be permanent or long term.Toyota Motor Mfg., 534 U.S. at 198.

In this case, plaintiff's impairment allowed her to return to light duty work in January of 1999, about four months after she stopped work on September 10, 1998. Such a period of time is not considered long term. See Baffoe v. W.H. Stewart, Co. No 99-6199, 2000 WL 484878 at *5,211 F.3d 1277(10th Cir. April 14, 2000)(plaintiff unable to work while recovering from surgery

released to return to work less than three months after he completed physical therapy, impairment "of short duration, with little or no long-term permanent impact.")(quoting 29 C.F.R. pt. 1630, App.§1630.2(j)(citing Colwell v. Suffolk County Police Dept., 158 F.3d 635,646(2d Cir. 1998)(impairment not substantially limiting where employee hospitalized for 30 days, then remained at home for six months and placed on light duty for seven years following return to work)); see also Sanders v. Arneson Prods.,Inc. 91 F.3d 1351, 1354 (9th Cir. 1996)(three and one-half month impairment with minimal residual effects not substantially limiting). Furthermore, the record contains no evidence that the USPS perceived plaintiff was subject to permanent or long term, and the record contains no evidence of any USPS record that plaintiff was subject to permanent or long term impairment. Barnes, the operations manager, *believed* plaintiff's work restrictions were temporary and to his knowledge her work restrictions and impairments were temporary. Because plaintiff has not demonstrated that she suffered from a disability, defendant is entitled to summary judgment on her claim of disability discrimination. See Woodman, 132 F. 3d at 1338; Pack, 166 F.3d at 1304 & n.4 (court need not consider whether employer discriminated because plaintiff could not demonstrate disability under ADA).

III. Discrimination on the Basis of Religion

Plaintiff alleges that because she had sworn to God that she would not complete another Form 3971, defendant subjected her to religious discrimination when it required her to submit a *properly* completed Form 3971 after her absence on August 11, 1998. Defendant asserts that it is entitled to summary judgment on this claim because plaintiff cannot demonstrate a prima facie case of religious discrimination.

To establish a prima facie case of religious discrimination, plaintiff must show that (1) she had a bona fide religious belief that conflicted with an employment requirement; (2) she informed the employer of this belief; and (3) her employer disciplined her because she did not comply with the conflicting employment requirement. See Thomas, 225 F. 3d at 1155.

Defendant asserts that plaintiff cannot establish that she had a bona fide religious belief that conflicted with the *requirement* to submit or re-submit a corrected leave slip. Further, plaintiff has not pointed to any evidence of a bona fide religious belief, observance or practice that required her to refrain from submitting leave slips. Defendant is therefore entitled to summary judgment on plaintiff's claim of religious discrimination.

IV. Retaliation Claim

Plaintiff asserts that defendant retaliated against her for filing EEO complaints. Specifically, plaintiff alleges that in retaliation for filing complaints of discrimination, defendant (1) failed to promote her to several positions for which she applied or attempted to apply; (2) refused to accept a leave slip for August 11, 1998; (3) placed a letter of warning in her record on August 26, 1998; and (4) terminated her saved grade pay status in February of 1999.

To set forth a prima facie case of retaliation, plaintiff must produce evidence that (1) she engaged in protected opposition to discrimination; (2) she suffered an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. See Wells, 325 F.3d at 1212. If she does so, the burden shifts to defendant to show a legitimate reason for the adverse action. A plaintiff can establish the causal connection by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. Barrus, 683 F.2d at 343. A retaliation claim does not require plaintiff prevail on the underlying discrimination claim. See Robbins v. Jefferson County School Dist., 186 F.3d 1253, 1258(10th Cir. 1999).

Plaintiff alleges numerous actions by the USPS that she asserts were in retaliation for filing complaints of discrimination. The Court addresses each in turn.

A. Failure to Promote Plaintiff to ASP Program

Plaintiff alleges that the USPS retaliated against her by not selecting her for the ASP program because of prior EEO activity. Defendant asserts that it is entitled to summary judgment on the

claim because plaintiff cannot demonstrate a causal nexus between prior protected activity (her EEO complaint of 1994) and the decision not to select her for the ASP program in February of 1997. Defendant further contends that even if plaintiff presented a prima facie claim, the USPS had a legitimate, nondiscriminatory reason for its decision not to promote plaintiff to ASP.

Defendant asserts that plaintiff cannot show a causal nexus because too much time passed between her prior EEO activity in May of 1994, and its decision on February 13, 1997 not to select her for the ASP program. The Court agrees that *absent other evidence* of retaliation, two years and 10 months between the prior protected activity and the alleged discrimination is generally too long a time to infer retaliation from temporal proximity. See Wells, 325 F.3d at 1217(five month gap, without more, ordinarily too great to infer causation on timing alone.); Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999)(three month period, *standing alone* , insufficient to establish causation). If the Court calculates the pertinent period from the date when plaintiff *signed* the settlement agreement on March 13, 1996, eleven months passed between that date and the decision not to place plaintiff in the ASP program. *Absent other evidence,* however, eleven months is still too long to infer retaliation.

Plaintiff has shown *no* temporal nexus between her prior EEO activity and her non-placement in ASP. She has not alleged circumstances which overcome the presumption against a nexus due to the absence of close temporal proximity. See Coors, 181 F. 3d at 1179(absent very close temporal connection, additional evidence required to prove nexus). Further, as defendant points out, only one member of the review board - Bruce Sanders - knew of plaintiff's prior EEO activity. He recalled the activity only vaguely. Sanders signed the settlement agreement that resolved the complaint but he was not named in the prior EEO complaint. Cf. Wells 325 F.3d at 1217(special circumstance included fact that person who fired plaintiff was specifically accused of discrimination in prior EEO complaint and was aware

of its filing.) Plaintiff has not produced evidence of the required nexus between the prior EEO activity and the alleged discriminatory action. Defendant is therefore entitled to summary judgment on plaintiff's claim that the USPS retaliated for her EEO complaint in 1994 when it decided not to place her in the ASP program.

Defendant alternatively asserts that even if plaintiff established a prima facie case of retaliation, the USPS had a legitimate, non-discriminatory reason for declining to accept plaintiff into the ASP program - she did not earn a composite score high enough to qualify for one of the 26 positions in the program. Plaintiff's performance in the interview, which the review board rated as among the worst of all interviewees, resulted in a low overall rating. Although plaintiff testified that her interview was "acceptable" or "passing", her personal opinion about her qualifications do not give rise to a material factual dispute. See Amro v. Boeing Co., 232 F.3d 790, 798 (10th Cir. 2000) (evaluation of own job performance insufficient to create a material issue.) Defendant has produced evidence of a legitimate, non-discriminatory reason for deciding that plaintiff was not one of the best qualified candidates for ASP. Plaintiff has not pointed to evidence to rebut this legitimate reason. Defendant is entitled to summary judgment on plaintiff's claim that in failing to select plaintiff for ASP program, it was retaliating for her prior EEO complaint.

B. Failure to Promote to Customer Services Supervisor In Olathe

Plaintiff claims that in retaliation for her EEO complaints in *1994,* the USPS did not select her for the Olathe Customer Services position. Defendant asserts that it is entitled to summary judgment on this claim because plaintiff has not set forth a prima facie case of retaliation. Specifically, defendant contends that plaintiff has not shown a causal nexus between *prior* EEO activity and the review board's decision not to select her for the Olathe position. See Wells, 325 F.3d at 1212. Plaintiff does not point to any evidence of a causal nexus. the only possible nexus is that Jean Moore, who had been plaintiff's

EEO counselor in July 1994, was a member of the Olathe position review board in 1997. This alone is insufficient to establish a nexus because three years passed between the time Moore acted as plaintiff's EEO counselor and the time she participated in the selection process for the Olathe position. See Wells, 325 F.3d at 1217; Coors, 181 F.3d at 1179. Moore did not *even* recall whether plaintiff was one of the hundreds of people in whose EEO proceedings she was involved. None of the other review board members knew of plaintiff's prior EEO activity. The Court concludes that plaintiff has not set forth a prima facie case of retaliation on her non-selection for the Olathe position.

Even if plaintiff set forth a prima facie claim, the USPS has *articulated* a legitimate, non-discriminatory reason for not promoting plaintiff. Plaintiff did not follow the procedure for submitting the Form 991 because she submitted an outdated supervisor's evaluation. After reviewing plaintiff's application and discovering that she had not submitted a current evaluation, the review board decided not to recommend plaintiff for the Olathe position. the Court finds that defendant is entitled to summary judgment on her retaliation claim concerning the Olathe position.

C. Failure to Promote to Customer Services Supervisor In Shawnee Mission

Plaintiff claims that the USPS retaliated against her for prior0 EEO complaints when it did not select her for the Supervisor of Customer Services in Shawnee Mission position. Defendant asserts that it is entitled to summary judgment because plaintiff has not set forth evidence of a prima facie case of retaliation. Specifically, defendant contends that plaintiff has not shown a causal nexus between *prior* EEO activity and the review board's decision not to select her for the position. See Wells, 325 F.3d at 1212. Again, Plaintiff does not point to any evidence of a causal nexus. As with the other position, the only possible nexus is that Jean Moore, who had been plaintiff's EEO counselor in July 1994, served on the Shawnee Mission position review board in 1997. Three years passed between the time Moore

acted as plaintiff's EEO counselor and the selection process for the Shawnee Mission position. See Wells, 325 F.3d at 1217; Coors, 181 F.3d at 1179. None of the other review board members knew of plaintiff's prior EEO activity and plaintiff has not set forth any other evidence of nexus. The Court concludes that plaintiff has not set forth a prima facie case of retaliation on her non-selection for the Shawnee Mission position.

Even if plaintiff had set forth a prima facie claim, the USPS has *articulated* a legitimate, non-discriminatory reason for its decision to not promote plaintiff to the Shawnee Mission position. As with the Olathe position, the Shawnee Mission vacancy announcement and the Form 991 instructed plaintiff to submit a current supervisor's evaluation for the position. The review board decided not to recommend plaintiff for the position because she did not do so. Plaintiff points to no evidence to rebut defendant's legitimate nondiscriminatory reason for not promoting her. The Court concludes that defendant is entitled to summary judgment on plaintiff's retaliation claim regarding the Shawnee Mission position.

D. Failure to Promote To Air Records Processor Position

Plaintiff next alleges that the USPS retaliated against her for previous EEO activity when it *mistakenly* concluded that she did not qualify for the Air Records Processor position in 1997. Defendant asserts that it is entitled to summary judgment because plaintiff has not set forth a primate facie case of retaliation. Defendant specifically asserts that plaintiff has not set forth evidence of a causal nexus between her *prior* EEO activity and the delay in placing her in an Air Records Processor position.

Barbara McCrary who was responsible for bid(internal hiring), testified that she had no knowledge of plaintiff's *prior* EEO activity, and plaintiff has not demonstrated any other reasonable nexus. Therefore, she has not set forth a prima facie case of retaliation.

Even if plaintiff had set forth a prima facie case of retaliation, she cannot demonstrate that she ultimately suffered any damage. The USPS placed plaintiff in an Air Records Processor position

during the pay period after *it* discovered that she qualified for the position, and later paid her *$3,576.77* for the lost pay period when she should have been placed in the position. Benningfield v. City of Houston, 157 F.3d 369, 378(5th Cir. 1998).(had plaintiff not received full pay retroactively, claim would fail) Cf. Toney v. Cuomo, 92 Supp. 2d 1186, 1193 (D. Kan. 2000)(Title VII does not guarantee against any deviations from procedure, deviation alone insufficient to establish pretext).

E. Plaintiff's Use of Leave and Letter of Warning

Plaintiff alleges that defendant retaliated against her by harassing her about use of leave, breaks and work and placing a letter of warning in her file on August 26, 1998. Defendant asserts that it is entitled to summary judgment because none of these activities constituted adverse employment actions. Alternatively, defendant asserts that it had a legitimate, non-discriminatory reasons for the actions.

Plaintiff alleges that her supervisor and manager took adverse employment action by repeatedly requiring her to resubmit leave forms and asking her whereabouts during breaks. Defendant points out that although the Tenth Circuit liberally defines adverse employment action, actions that are merely inconvenient do not constitute adverse actions. Wells, 352 F.3d at 1212-13; Heno v. Sprint/United Mgmt.,Co., 208 F3d 847, 857 (10th Cir. 2000)). Indeed, plaintiff's allegations do not demonstrate that defendant's conduct was materially adverse to her job status.[13] Wells, 325 F3d at 1213. Therefore she has not demonstrated that she was subjected to adverse action. Further, plaintiff has produced *no evidence* of disparate treatment; i.e. that other employees did not have to resubmit claim forms or answer

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On numerous occasions, plaintiff had submitted *defective* Forms 3971 in which she had requested multiple types of leave in the same request, or had requested COP, a category of leave for which she did not qualify because she did not at the time have a recognized on-the-job injury.

questions about their breaks.

Plaintiff also alleges that the USPS retaliated against her when it issued a letter of warning on August 26,1998. Defendant asserts that plaintiff has not set forth a prima facie case of retaliation because the letter of warning, which was expunged, did not constitute adverse employment action. See Cuenca v. Univ. of Kan. 265 F. Supp 2d 1191,1209(D.Kan. 2003)(letter of reprimand is not adverse action where id did not have negative effect on employment); see also Benningfield, 157 F.3d at 377(formal AWOL reprimand that was rescinded by internal procedures not adverse employment action); cf. Roberts v. Roadway Exp. Inc., 149 F3d 1098,1104(10th Cir. 1998) (20 written warnings were adverse actions because the more warnings an employee received, the more likely termination for further infraction would be). In this case, defendant expunged the warning letter though a grievance settlement dated September 22,1998, and the record contains no evidence that the letter has impacted the terms and conditions of plaintiff's employment.

Plaintiff has not shown that the requests for re-submission of leave forms, inquiries about breaks,or the expunged letter constitute adverse employment action. Defendant is entitled to summary judgment because plaintiff has not set forth evidence of a prima facie case of retaliation based on these actions.

F. Failure To Promote To Clerk Stenographer Position

Plaintiff alleges that defendant retaliated against her for prior EEO activity when it did not place her in the position of Clerk Stenographer. Defendant asserts that it is entitled to summary judgment because plaintiff has not presented evidence of a prima facie case and even if she did, it had a legitimate, non-discriminatory reason for not promoting her to the position.

To present a prima facie case of failure to promote, plaintiff must show that she was qualified for the position. See Amro, 232 F. 3d at 796. Plaintiff's *performance* on the Clerk Stenographer examination rated a *scoring*, which disqualified her from the position. Further plaintiff must demonstrate a causal nexus between her *prior* EEO activity and the decision not to place her in the stenographer position. Barbara McCrary was

person responsible for filling the position, and she knew nothing about plaintiff's prior EEO activity. Plaintiff has not set forth a prima facie case of retaliation as to the Clerk Stenographer position. Furthermore, even assuming that plaintiff established a prima facie case, defendant has *articulated* a legitimate, non-discriminatory reason for the decision not to place her as a Clerk Stenographer - her test *rating* of ineligible. Plaintiff has not attempted to rebut the proffered legitimate reason. Defendant is entitled to summary judgment as to plaintiff's claim of retaliation based on the Clerk Stenographer position. H. Rejection of Plaintiff's Application for Stamp Distribution Clerk Plaintiff alleges that in retaliation to prior EEO activity, the USPS improperly rejected her application for the position of Stamp Distribution Clerk. Defendant asserts the plaintiff has not set forth a prima facie claim of retaliation because she has not set forth a causal nexus between prior EEO activity and the allegedly discriminatory act. Plaintiff has not shown any reasonable nexus and defendant is entitled to summary judgment on the retaliation claim.Reduction In Plaintiff's Base Pay From Level 6 To Level 5 Finally, plaintiff alleges that in 1997 when the USPS reduced her base pay from Level 6 to level 5, it was retaliating for *prior* EEO activity. Defendant asserts that it is entitled to summary judgment because plaintiff does not demonstrate a prima facie case of retaliation. Specifically, defendant asserts that plaintiff has not shown a reasonable nexus between *prior* EEO activity and allegedly discriminatory actions. The USPS personnel responsible for the change in pay status, Davila-Brownlee did not know about plaintiff's *prior* EEO activity. Plaintiff has not pointed to other evidence of a nexus between the decision to reduce her pay status and her prior EEO activity. Therefore, defendant is entitled to summary judgment on this claim.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgement (Doc. #44) filed January 20, 2004 be and hereby is SUSTAINED in part and OVERRULED in part.

Plaintiff's claims that defendant discriminated against her on the basis of race and sex remain for trial. Defendant is entitled to summary judgment on all other claims.

Dated this 5th day of May 2004 at Kansas City, Kansas.

NOT SIGNED Kathryn H. Vratil

United States District Judge

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*(Above ITALICIZED at Petitioner's reformatting of some inaccuracies. Practice ceased due to too numerous throughout. SEE DOCKET NUMBER 72 and APPENDIX as filed by Petitioner.)

IN THE PRO- AND PRE- CEDING DOCUMENTS OF THE DISTRICT COURT, SETTLEMENT FOR THE **1994** VIOLATION IS REFERRED TO IMPLYING IT WAS WITNESSED BY THE JUDICIARY. HOWEVER, THE COURT FAILS TO NOTE THAT SETTLEMENT AGREEMENT FOR THE SAME **WAS REACHED IN 1996.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KATHY V. WILLIAMS,
Plaintiff

Civil Action

v.

No.O2-2568-KHV

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE,
Defendant.

MEMORANDUM AND ORDER

Kathy Williams brings suit against defendant John E. Potter, Postmaster General of the United States Postal Service ("USPS"), alleging that the USPS discriminated against her on the bases of race, sex, religion and

disability, and retaliated against her for protected activity, in violation of Title VII ofthe Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et Vocational Rehabilitation Act of 1973 ("Rehabilitation Act"), as amended, 29 U. S.C. § 791, 794. On May 5, 2004, the Court granted defendant's summary judgment motion as to plaintiffs claims of discrimination based on religion and disability and retaliation for protected activity. See Memorandum And Order (Doc. #70) filed May 5,2004. At a status conference on May 5, 2004, the Court granted defendant leave to file a motion for summary judgment as to plaintiff's remaining claims for discrimination on the basis of race and sex. This matter comes before the Court on Defendant's Motion For Summary Judgment On Plaintiff s Race And Gender Discrimination Claims (Doc. #74) filed May 25, 2004, Defendant's Motion In Limine (Doc. #64) filed April 28, 2004, plaintiff s Motion To Compel Mail Delivery (Doc. #77) filed June 10,2004, and Defendant's Motion To Continue Trial (Doc. #84) filed August 18, 2004. For reasons set forth below, the Court finds that
defendant's motion for summary judgment should be sustained, and that defendant's motion in limine and motion to continue trial and plaintiff s motion to compel should be overruled.

Summary Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter oflaw. Rule 56(c), Fed. R. Civ. P.;accord Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247 (1986); Vitkus v. Beatrice Co., 11 F.3d1535,1538-39 (lOth Cir. 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. Id. at 252. The moving party bears the initial burden of showing the absence of any genuine issue of material fact. See Celotex

Corp. v. Catrett, 477 U.S. 317,323 (1986); Hicks v. City ofWatonga, Olka., 942F.2d 737, 743 (lOth Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." Applied Genetics Int'I. Inc. v. First Affiliated Secs..Inc., 912 F.2d 1238, 1241 (lOth Cir. 1990); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,586-87 (1986); Bacchus Indus.. Inc. v. Arvin Indus.. Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. See Applied Genetics, 912 F.2d at 1241.

The Court must view the record in a light most favorable to the party opposing the motion for summary judgment. See Deepwater Invs.. Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (lOth Cir. 1991). Summary judgment may be granted ifthe nonmoving party's evidence is merely colorable or is not significantly probative. See Anderson, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." Conaway v. Smith, 853 F.2d 789, 794 (lOth Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 251-52.

The Court affords a pro se plaintiff some leniency and must liberally construe the complaint. See Oltremari v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1333 (D. Kan. 1994). While pro se complaints are held to less stringent standards than pleadings drafted by lawyers, pro se litigants must follow the same procedural rules as other litigants. See Hughes v. Rowe, 449 U.S. 5, 9 (1980); Green v. Dorrell, 969F.2d 915, 917 (lOthCir. 1992). The Court may not assume the role of advocate for a pro se litigant. See Hall v. Bellman, 935 F.2d 1106,1110 (10th Cir. 1991).

Facts

At a status conference on May 5,2004, the Court advised plaintiff to consult the pretrial order and local rules before she responded to defendant's motion for summary judgment. The Court specifically advised plaintiff that to controvert factual statements in defendant's motion for summary judgment, she must provide citations to the record, and that any evidence which she used to counter defendant's factual assertions would need to be authenticated. On June 10,2004, plaintiff filed an opposition brief. See Response To Defendant's Second Motion For Summary Judgment (Doc.#79).1 Plaintiff s opposition brief does not set forth the specific paragraphs in defendant's memorandum that she disputes, does not specifically contradict defendant's factual assertions with reference to those portions of the record upon which she relies, does not set forth additional facts in separately numbered paragraphs and does not include any affidavits, declarations or other materials in compliance with Rule 56(e), Fed. R. Civ. P. Accordingly, under D. Kan. Rule 56.l(b), the Court accepts defendant's factual statements, which are adequately supported by record evidence, as true. For summary judgment purposes, the following facts are uncontroverted, deemed admitted or, where disputed, viewed in the light most favorable to plaintiff.

The USPS hired plaintiff in 1987, and she continues to work for the USPS. On May 22, 1994, plaintiff filed an Equal Employment Opportunity complaint ("EEO complaint") with the USPS ("Complaint No.1 085-94") alleging discrimination on account of race (black), color(brown), national

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1(.. .continued)

(b) Opposing Memorandum.

(1) A memorandum in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered by

paragraph, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of movant's fact that is disputed.

(2) If the party opposing summary judgment relies on any facts not in movant's memorandum, that party shall set forth each additional fact in a separately numbered paragraph, supported by references to the record, in the manner required by subsection (a), above. All material facts set forth in this statement of the non-moving party shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the

D. Kan. Rule 56.1.

Plaintiff purports to dispute many of defendant's factual statements, but she does not refer to portions of the record on which she relies. Accordingly, the Court deems such facts admitted.

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origin (African-American) and sex (female). Williams Dep. 113-14; Williams Dep. Ex. 4. On March 13, 1996, plaintiff signed an EEO Settlement Agreement which resolved Complaint No.1 085-94 in exchange for a payment of money. The Settlement Agreement stated in part as follows:

I fully understand that by agreeing to this settlement, I waive my rights to any further appeal of my allegation(s) through the EEO process. I further state that this agreement did not result from harassment, threats, coercion or intimidation.

I am fully aware that any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process is binding on both parties.

Should I believe the Postal Service has failed to adhere to the stipulations contained in this agreement for any reason not attributable to my acts or conduct, I must notify the EEO Compliance and Appeals Coordinator located in my area, in writing, of the alleged noncompliance within 30 calendar days of the alleged noncompliance. . .

Management agrees to the aforementioned stipulation solely in

an effort to resolve the complainant's allegation(s), and this agreement should not be construed as an admission of discrimination or wrongdoing on the part of any official of the U.S. Postal Service.
Whitworth Decl. Attachment 1. After 1994, plaintiff lodged seven additional EEO complaints on four dates: No. 4-1-640-0092-97 on April 16, 1997; Nos. 4-1-640-0014-98, 1-1-641-0059-97, 4-1-6400013-98 and 4-1-640-0015-98 on November 3,1997; No. 1-1-643-0016-98 on December 3,1998; and No. 1-1-643-0006-99 on April19, 1999. See Complaint Ex. A.

Non-Placement In The ASP Program

In early 1997, the USPS implemented the Associate Supervisor Program ("ASP") to identify strong supervisor candidates in the greater Kansas City area and train them to become associate supervisors. In late 1997, the USPS had 26 vacancies for the ASP program. To apply for the ASP program, an employee had to submit a Form 991 application, take a written examination, submit a writing sample and interview with the review board. The interview consisted of nine prepared questions which were designed to solicit information to rate the candidates in seven areas: leadership, decision making, human relations, verbal communications, safety, labor relations and reasoning. In approximately October of 1996, plaintiff applied for the ASP program. In early to mid-October, R. Dean Alberti, who was not plaintiff's current immediate supervisor, volunteered to prepare an initial supervisor evaluation for plaintiff s ASP application.
The ASP review board comprised Bruce Sanders (Manager Distribution Operations, Kansas City, Missouri), Pat Barba (Manager, Customer Service Operations, Kansas City, Missouri), Rosemary Goldblatt (Human Resources Specialist, Kansas City, Missouri) and John Coolidge (Postmaster, Kansas City). On March 13, 1996, Sanders had signed the Settlement Agreement regarding EEO Complaint No. 1-1-641-1085-94. None of the other ASP review board members knew of plaintiff's EEO activity.

The ASP review board initially reviewed the applications and

selected 17 candidates, including plaintiff, for interviews. Eligibility for an interview did not mean that the candidate was guaranteed to be selected for the ASP program. After consulting with the ASP Coordinator, the review board reviewed the applications a second time, to expand the applicant pool to a number large enough to fill 26 ASP vacancies. Plaintiff remained eligible for an interview, but that did not mean that she had been selected for the ASP program.

Plaintiff performed poorly at her ASP interview. The review board rated her performance as "minimal" in six of the seven interview criteria, and plaintiff had one ofthe lowest interview scores.

Plaintiff testified that her performance during the interview was "passing" and "acceptable." She also stated that "I don't believe my best was required." Plaintiff also admitted, however, that she had no basis on which to compare her interview performance and that of other applicants. Williams Dep. 241-42. Further, on February 17, 1997, plaintiff stated in a letter to USPS Regional Director William Brown that "I had explained to the interviewers at the time of the interview that I was not at my best due to personal reasons without expounding (i.e. a death the day before, two additional burdens and one of the first questions asked during the interview process)." Williams Dep. Ex. 10 at 043.

The review board compiled each candidate's scores *from* the written examinations, written applications, supervisor evaluations and interviews. The board then selected *for* the ASP program the 26 candidates with the highest composite scores. The board selected ten women, including three African-American women, and seven African-American men. The board did not select plaintiff.

Supervisor, Customer Services, Olathe, Kansas

On April 8, 1997, the USPS issued a vacancy announcement *for* the position of Supervisor, Customer Services, at the Olathe Post Office in Olathe, Kansas. The announcement stated: "HOW TO APPLY (Individual Announcement Procedures): Complete Form 991 and return DIRECTLY to *your* immediate supervisor before the closing date shown above."2 Williams Dep. Ex. 21; Williams

Dep.336-37. The Form 991 stated: "If *you* are applying *for* a specific position, complete pages 1-4 of this *form* and submit the completed *form* to *your* supervisor, who will complete the evaluation *for* each requirement. If *you* want a copy of the evaluation, check the box at left." Plaintiff checked the box with a handwritten "x." Williams Dep. Ex. 22 at 066. Plaintiff did not submit the completed Form 991 to her immediate supervisor, and she did not ask her then-current immediate supervisor to prepare a supervisor's evaluation *for*
her application for
2 The USPS Handbook section which governs individual announcement application
procedures requires employees applying *for* an initial level supervisor position to submit Form 991 (j ob application) "to their immediate supervisor *for* evaluation." EEO Case No. 4-1-640-0013-98 Ex. 34; EEO Tr. 154-55 (Wilson).

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the Olathe position. Instead, she attached to her application materials an evaluation which her former supervisor, Bruce Sanders, had written for a prior job application (no. 96-55). Sanders had completed that evaluation on August 20, 1996 - about eight months before plaintiff submitted her application on April 22, 1997.

The review board for the Olathe position comprised chairperson Sara Wilson (Postmaster, Baldwin City, Kansas), Edward Keith Coleman (Operations Support Specialist) and Jean Moore (Supervisor, Customer Service Operations, Shawnee Mission, Kansas). Wilson and Moore are females, and Coleman is African-American. The review board members did not recommend plaintiff for the Olathe position because her supervisor evaluation was not current and plaintiff had not received a consolidated rating as one of the most qualified candidates.3

Customer Services Supervisor. Shawnee Mission. Kansas
On April 8, 1997, the USPS issued a vacancy announcement for the position of Customer Services Supervisor, at the Shawnee

Mission Post Office in Shawnee Mission, Kansas. As with the 01athe position, the announcement stated: "HOW TO APPLY (Individual Announcement Procedures): Complete Form 991 and return DIRECTLY to your immediate supervisor before the closing date shown above."4 Williams Dep. Ex. 26; Williams Dep. 352-53; Moore Dep. Ex. 4.

Plaintiff submitted the Form 991 for the Shawnee Mission position, which stated: "If you are applying for a specific position, complete pages **1-4** of this form and submit the completed form to

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Wilson had been trained that an important part of the application was a timely supervisor's evaluation. EEO Tr. 152 (Wilson); see also EEO Tr. 149.

4 Again, the USPS Handbook provides that employees applying for an initia1 1eve1 supervisor position must submit the Form 991 "to their immediate supervisor for evaluation." EEO Case No. 4-1-640-0013-98 Ex. 34; EEO Tr. 154-55 (Wilson).

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your supervisor, who will complete the evaluation for each requirement. If you want a copy of the evaluation, check the box at left." Plaintiff checked the box with a handwritten "x." Williams Dep. Ex. 27 at 100. Plaintiff did not submit the completed Form 991 to her immediate supervisor. Further, instead of asking her then-current immediate supervisor to prepare an evaluation, she copied the Bruce Sanders evaluation for the prior job application (no. 96-55) and attached that evaluation to her application materials for the Shawnee Mission position. Sanders had prepared plaintiff s evaluation on August 20, 1996, and plaintiff submitted her application for the Shawnee Mission position on April 22, 1997.

The review board for the Shawnee Mission position comprised

chairperson Charles Pennewell (Manager, Customer Service Operations, Prairie Village branch in Shawnee Mission, Kansas), JeffreyOmang (Manager, Customer Service, Leawood Branch in Shawnee Mission, Kansas) and Jean Moore (Supervisor, Customer Service Operations, Shawnee Mission, Kansas). The review board members did not recommend plaintiff for the position because her supervisor evaluation was not current.

Air Records Processor Position

In 1997, plaintiff applied for and qualified for the position of Air Records Processor. Barbara McCrary, a USPS human resources specialist who was responsible for internal bidding forpositions, was mistakenly informed that plaintiff did not qualify for the position. In August of 1997, the USPS awarded the position to another employee. In September of 1997, the USPS discovered its error. In October, it placed plaintiff in an Air Records Processor position.5

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5 In November of 1999, during pay period 24, the USPS paid plaintiff $3 ,576.77 as out of-schedule-pay for pay periods 16 through 21 of 1997 in connection with an EEO complaint. Decl. of Lonnie Beattle at 3-4. Pay periods 16 through 21 of 1997 correspond to July through October of 1997, the time for which plaintiff had qualified for the position of Air Records Processor, but had not yet been placed in the position.

Plaintiffs Use Of Leave

On August 9, 1998, plaintiff submitted a Fonn 3971 (a request for or notification of absence) on which she requested three different types of leave: "COP" (continuation of pay), "sick" and "other". Because the form requested three different types of leave, Jerome Greene, plaintiff supervisor, denied the request and told plaintiff to re-submit the form with only one block checked to indicate the type of leave that she was requesting. 6

On August 11, 1998, two days after she applied for leave, plaintiff was absent. When she returned to work, Greene

specifically instructed her to submit a Form 3971 requesting leave for August 11. Plaintiff refused. Barnes, acting manager of operations, then asked her to change the Form 3971, and plaintiff replied that she had "sworn to God" that she would not sign another Form 3971. On approximately August 26, 1998, Greene issued plaintiff a Letter of Warning for being absent without leave ("AWOL") on August 11, 1998. Barnes Dep. 132-33; Barnes Dep. Ex. 8 at25- 26 (unsigned copy). Pursuant to a grievance process, on September 10, 1998, Barnes directed that the warning letter be expunged from plaintiff s record effective January 1, 1999, if she had no further AWOL-related discipline by that date. Plaintiff fulfilled that condition and the USPS expunged her warning letter.

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6 On numerous occasions, plaintiff had submitted defective Forms 3971 in which she had requested multiple types of leave in the same request, or had requested Continuation of Pay ("COP"), a category of leave for which she did not qualify because she did not at the time have a recognized on-the-job injury. Greene had previously required plaintiff to resubmit a Form 3971 because she had requested COP leave for which she did not qualify.

Clerk Stenographer Position

In June of 1997, plaintiff applied for the position of Clerk Stenographer. She took the required examination on June 19,1997. Barbara McCrary, who was responsible for posting, bidding and awarding jobs, administered the exam. On June 29, 1997, plaintiff received a rating of "ineligible" for the Clerk Stenographer position.

Stamp Distribution Clerk Position

In January of 1999, the USPS solicited applications for the position of Stamp Distribution Clerk (Notice 99BQOl). The vacancy notice stated that each applicant was responsible for ensuring that the application reached the Assignment Desk, Room 567, General Post Office not later than 4:00 p.m. on

January 28, 1999. The USPS did not consider untimely applications. Plaintiff applied for the Stamp Distribution Clerk position but her application was received on February 3, 1999 - after the deadline. On February 3, 1999, Human Resources Specialist Ofenie Roper sent plaintiff a letter which stated that her application was late and that she was therefore ineligible for the position. EEO Tr. 732-33; Investigative File for EEO Case No. 1-1-643-006-99 at 088. Ofenie Roper is an African American female.

Reduction Of Plaintiffs Base Pay Due To Failure To Apply For Available Positions

Plaintiff worked as a Mail Processing Letter Sorting Machine Distribution Clerk ("letter sorting machine clerk") from September 1987 until July 18, 1997, when the USPS abolished her position because it was eliminating letter sorting machines. Plaintiff was at pay Level 16 when the USPS eliminated her position. The USPS provided letter sorting machine clerks protection against a decrease in pay level if they met certain conditions and it also gave them the right to retreat to the first available Level 6 position. Beginning July 19, 1997, plaintiff received saved grade protection.

She was entitled to pay protection until she failed to bid or apply for any posted Level 16 (or higher) full time assignment or until she asked to change to a lower level position. In October 1997, the USPS posted a Level 6 PSDS Technician position for which plaintiff did not apply. In February of 1999, the USPS realized that plaintiff was not entitled to continue saved grade status because she had not applied for the PSDS Technician position. It therefore terminated plaintiffs saved grade status and reduced plaintiffs pay to Level 5.

Analysis

I. Plaintiff's Motion To Compel Mail Delivery

On May 26, 2004, defendant electronically filed a supplemental discovery response and a certificate of service to plaintiff by mail. Plaintiff asserts that on May 28, 2004, defendant" deliberately and with malice aforethought withheld notification of action as

allegedly served on Plaintiff by Defendants' (sic) representative, United States Attorney General Assistant Zimmerman."
Plaintiff s Motion To Compel Mail Deliverv (Doc. #77) filed June 10,2004, at 2. On May 28, 2004, plaintiffs letter carrier, Morton E. Peddicord, Jr., attempted to deliver a large envelope to plaintiffs mailbox. The mailbox was full of mail which had been delivered on previous days. Peddicord therefore placed in plaintiff s mailbox a notice that he had attempted to deliver a large envelope. The notice stated that plaintiff could pick up the envelope at the post office after 4:45 p.m. that day.
Plaintiff did not pick up the package from the post office. On June 8, 2004, plaintiff wrote a note to Peddicord, asking whether a package which she had found in her mailbox was the one to which Peddicord had referred. Peddicord left a note that same day, stating: "I'll check for you. If there is a parcel I'll bring it out on 6-9-04." Exhibit 5 to Plaintiff s Motion To Compel (Doc. #77). Peddicord found the envelope when he returned to the post office. On June 9, 2004, Peddicord delivered theenvelope to plaintiff s mailbox. Plaintiff states that when she received the envelope (which contained defendant's supplemental disclosures comprised of copies of plaintiff s payroll records) it was "fully opened." Plaintiff suggests that defendant's representatives and employees have withheld and tampered with her mail, thereby obstructing justice and violating United States Code Title 39.
Plaintiff asks the Court to issue an order prohibiting defendant from any further such action. Defendant responds with Peddicord's statement that when he attempted to deliver the package, he did not know that plaintiff had a pending suit against the USPS. Plaintiff has presented no evidence that defendant or defendant's employees intentionally damaged the package. Furthermore, the package contained copies of plaintiff s payroll records and she does not claim that the contents were damaged or missing. Further, plaintiff has not identified any deadline that she missed because of the delay in delivery. In these circumstances, the Court finds that plaintiffs motion should be overruled.

II. Defendant's Motion For Summary Judgment

Plaintiff claims that defendant discriminated against her on the

bases of sex and race. Specifically, plaintiff alleges that because of her sex and race, defendant (a) failed to promote her to positions for which she applied or attempted to apply;7 (b) in August of 1998, refused to accept a leave slip; (c) placed a warning letter in her record on August 26, 1998; and (d) terminated her saved 7

With regard to several positions for which plaintiff attempted to apply but her application was late, plaintiff attempts to characterize defendant's actions as adverse employment actions. Defendant asserts that those are properly deemed failure to promote claim. The Court finds that the claims are failure to promote claims because the refusal to accept the applications did not impact her then current conditions of employment.

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grade pay status in February of 2002. Defendant seeks summary judgment, arguing that plaintiff cannot establish a prima facie case of sex or race discrimination and/or that even if plaintiff set forth a prima facie case, it has legitimate nondiscriminatory reasons for not promoting her to positions for which she applied, not accepting her leave slip, placing a warning letter in her record on August 26, 1998 and terminating her saved grade pay status in February of 2002. In response, plaintiff does not specifically address whether she has set forth a prima facie case or whether defendant's proferred reasons are a pretext for discrimination. Rather, she strenuously objects to the Court's decision to let defendant file a second motion for summary judgment and alleges that defendant's facts are based upon perjured testimony and altered documents.8 Plaintiff asserts as follows:

Defendant's re-presentation of false and misrepresented information without due regard for **perjured** alterations selectively presents evidence and centers arguments around the same presupposing the Court's continued biased demonstration by review solely of the information supplied by this officer of the Court while failing to view all the evidence as presented by Plaintiff and affirmed by Defendant's representative.

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8 The Court allowed defendant to file a second

motion for summary judgment when it became clear, at the status conference on May 5, 2004, that defendant believed in good faith that aside from defendant's conduct which resulted in the 1994 settlement, the pretrial order did not assert claims for race or sex discrimination. In ruling on defendant's first motion for summary judgment, the Court stated as follows:

Reading the pretrial order as a whole, it is clear that plaintiff alleges discrete, independent acts of race and sex discrimination in EEOC complaints which she filed *after* she settled EEO Complaint Number 1085-94. See infra, footnote 11. Defendant has not addressed the merits of these claims. The Court therefore finds that defendant is not entitled to summary judgment on plaintiff's claims of discrimination on the bases of race and sex.

Williams v. Potter, 316 F. Supp.2d 1122, 1135 (D. Kan. 2004).

Although it overruled defendant's motion for summary judgment on plaintiff s sex and race discrimination claims, the Court determined that affording defendant the opportunity to file a second motion for summary judgment would serve the interests of justice and judicial economy.

Plaintiff asserts Defendant's pretext, falsification of documentation and perjured testimony evidence discrimination and temporal nexus for the same and is apparent to any reasonable and prudent purveyor **upon** review.

Plaintiff's objection and appeal as applicable under Federal Rules Of Civil Procedure 60 as filed with this Court applies to Defendants' second rendering upon these bases is reiterated in part herewith as filed with the Court by personal delivery on 24th day of May 2004.

Comes now Plaintiff. . . seeking the mercy and justice of this Court by demonstration of evidence contradictory to alleged facts which the Court states Its ruling is based on.

Said facts are representative of Defendants' pretext contained in Motion For Summary Judgment without consideration of Plaintiffs Response and rendered evidence as supportive opposition to pretext and the Court's stated facts.

WHEREAS, Plaintiff asks this Court to read the seventy-nine (79) page appeal inclusive of exhibit list and the corresponding exhibits

with continued arguments to render justice.

Plaintiff s Response To Defendant's Second Motion For Summary Judgment (Doc. #79) filed June 10,2004 at 2-3 (emphasis added).

Under Title VII, it is "an unlawful employment practice for an employer. . . to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.c. §2000e-2(a)(1). Disparate treatment analysis is applied to claims alleging the employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.

To prevail on her disparate treatment claim under Title VII, plaintiff must show that the discrimination complained of was intentional. See Shorter v. ICG Holdings. Inc., 188 F.3d 1204, 1207 (lOth Cir. 1999). In a Title VII disparate treatment case, plaintiff has the initial burden to make a prima facie showing of sex or race discrimination by defendant. See McDonnell Douglas Corp. v.Green, 411 U.S. 792, 802 (1973) (racial discrimination); Burdine, 450 U.S. at 252-56 (sex discrimination). Plaintiff satisfies this burden by presenting a scenario which on its face suggests that defendant more likely than not discriminated against her. See Burdine, 450 U.S. at253. The burden of establishing a prima facie case of disparate treatment is not onerous. Id. If plaintiff establishes a prima facie case, the burden shifts to defendant to articulate a "legitimate, nondiscriminatory reason" for the challenged employment action. McDonnell Douglas, 411 U.S. at 802-03. To satisfy this burden, the "employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Anaeme v. Diagnostek, Inc., 164 F.3d. 1275, 1279 (lOth Cir. 1999) (quoting Burdine, 450 U.S. at 257). If defendant meets this burden, the burden then shifts back to plaintiff to provide evidence that defendant's reason is pretextual or unworthy of belief. McDonnell Douglas, 411 U.S. at 804-05. See Danville v. Reg'l Lab. Corp., 292 F.3d 1246, 1250 (lOth Cir. 2002) (citing

Stone v.Autoliv ASP, Inc., 210 F.3d 1132, 1137 (lOth Cir. 2000)). Pretext "can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (lOth Cir. 1997)).

A. Failure To Promote Plaintiff To ASP Program

As stated above, plaintiff alleges that the USPS violated Title VII by not selecting her for the ASP program because of her race and sex. Defendant asserts that it is entitled to summary judgment on this claim because plaintiff cannot set forth a prima facie case of race or sex discrimination and,
even if plaintiff presented a prima facie claim, the USPS had a legitimate, nondiscriminatory reason for its decision not to promote plaintiff to the ASP program.

To make a prima facie showing that defendant discriminated against her on the basis of sex and/ or race when it did not promote her to the ASP pro gram, plaintiff must show that (I) she belongs to a protected class; (2) she sought and was qualified for the ASP program; (3) despite her qualifications, she was not transferred into that program; and (4) the program position was filled or remained open and defendant continued to seek applicants from people of plaintiff s qualifications.
See Amro v. Boeing *Co.*, 232 Kan. F.3d 790, 796-97 (D. Kan. 2000) (treating failure to promote claim as analogous to failure to hire claim)(citing McDonnell Douglas, 411 U.S. at 802). Defendant asserts that the record reflects that plaintiff was not qualified for the ASP program. Defendant points out that plaintiff has not rebutted its evidence that her performance on the interview was unacceptable.

Defendant alternatively asserts that even if plaintiff established a prima facie case of discrimination, the USPS had a legitimate, non-discriminatory reason for declining to accept plaintiff into the ASP program - she did not earn a composite score high enough to qualify for one of the 26 positions in the program. Plaintiffs

performance in the interview, which the review board rated as among the worst of all interviewees, resulted in a low overall rating. Although plaintiff testified that her interview was "acceptable" or "passing," her personal opinions about her qualifications do not give rise to a material factual dispute. See Amro, 232 F.3 d at 798 (evaluation of own job performance insufficient to create material issue). Defendant has produced evidence of a legitimate, non-discriminatory reason for deciding that plaintiff was not one of the best qualified candidates for the ASP program. Plaintiff has not pointed to any evidence to rebut this legitimate reason. Even if she asserted that defendant used her poor interview as a pretext not to promote her, defendant has presented evidence that it selected three African American females, seven other females, and seven African American males for the 26 ASP positions. The Court finds that defendant is entitled to summary judgment on plaintiffs claim that in failing to select plaintiff for the ASP program, it discriminated against her on the basis of sex and/or race.

B. Failure To Promote To Customer Services Supervisor In Olathe

Plaintiff claims that defendant discriminated against her on the basis of her sex and/or race when it did not select her for the Olathe Customer Services Supervisor position. Defendant asserts that it is entitled to summary judgment on this claim because, even assuming that plaintiff has set forth a prima facie case of sex and/or race discrimination, defendant has shown a legitimate, nondiscriminatory reason for not promoting her - plaintiff did not follow the procedure for submitting the Form 991 because she submitted an outdated supervisor's evaluation.

After reviewing plaintiffs application and discovering that she had not submitted a current evaluation, the review board decided not to recommend plaintiff for the Olathe position. Plaintiff has not come forward with any evidence that defendant's stated reason for not promoting her to the Olathe position was a pretext for race or gender discrimination. The Court therefore finds that defendant is entitled to summary judgment on plaintiff s claim that in failing to promote her to the Olathe position, it discriminated against her on the basis of sex and/or race.

C. Failure To Promote To Customer Services Supervisor In Shawnee Mission

Plaintiff claims that the USPS discriminated against her on the basis of her sex and/or race when it did not select her for the Supervisor of Customer Services in Shawnee Mission. Defendant asserts that it is entitled to summary judgment because even assuming plaintiffhas set forth evidence of a prima facie case of race and/or sex discrimination, it had a legitimate, non-discriminatory reason for its decision not to promote plaintiff to the Shawnee Mission position.

As with the Olathe position, the Shawnee Mission vacancy announcement and the Form 991 instructed plaintiff to submit a current supervisor's evaluation for the position. The review board decided not to recommend plaintiff for the position because she did not do so. Plaintiff points to no evidence to rebut defendant's legitimate, nondiscriminatory reason for not promoting her. The Court therefore concludes that defendant is entitled to summary judgment on plaintiff s race and sex claims regarding the Shawnee Mission position.

D. Failure To Promote To Air Records Processor Position

Plaintiff next alleges that the USPS discriminated against her on the basis of race and sex when it initially concluded that she did not qualify for an Air Records Processor position in 1997. Defendant asserts that even assuming that plaintiff has set forth a prima facie case of race and/or sex discrimination, defendant has articulated a legitimate, non-discriminatory reason for its action - it simply made a mistake when it initially determined that plaintiff did not qualify for the position. A mistake is not evidence of intentional discrimination. See Tonev v. Cuomo, 92 F. Supp. 2d 1186, 1193 (D. Kan. 2000) (deviation from procedure, standing alone, not sufficient to find pretext); Kidd v. MBNA Am. Bank, N.A. ,224 F. Supp. 2d 807, 811-12 (D. Del. 2002), affd, 93 Fed. Appx. 399, 2004 WL 603448, at * *2 (3rd Cir. Match 25, 2004) (mistake was legitimate, nondiscriminatory reason and plaintiff did not present evidence on which fact finder could reasonably believe that discriminatory reason was more likely motivating cause of defendant's action).9 Because plaintiff

9Defendant further argues that plaintiff cannot demonstrate that

she ultimately suffered
(continued...)

has not pointed to any evidence to rebut defendant's nondiscriminatory reason, the Court finds that defendant is entitled to summary judgment on plaintiff s claim that defendant discriminated against her on the basis of sex and race when it delayed placing her in the Air Records position.

E. Plaintiff s Use Of Leave And Letter Of Warning

Plaintiff alleges that defendant discriminated against her on the basis of sex and race by harassing her about use of leave and breaks and by placing a letter of warning in her file on August 26, 1998. Defendant asserts that it is entitled to summary judgment because none of these actions constituted adverse employment actions. Alternatively, defendant asserts that it had legitimate, non discriminatory reasons for the actions.

Plaintiff alleges that her supervisor and manager took adverse employment action by repeatedly requiring her to resubmit leave forms and asking her whereabouts during breaks.

Defendant points out that although the Tenth Circuit liberally defines adverse employment actions, actions that are merely inconvenient do not constitute adverse actions. Wells, 325 F.3d at 1212-13; Heno v. SprintlUnited Mgmt. Co., 208 F.3d 847, 857 (lOth Cir. 2000). Indeed, plaintiffs allegations do not demonstrate that defendant's conduct was materially adverse to her job status.1O Wells, 325 F.3d at 1213. Therefore she has not demonstrated that defendant subjected her to adverse action.

9(.. .continued)

any damages. The USPS placed plaintiff in an Air Records Processor position during the pay period after it discovered that she qualified for the position, and later paid her $3,576.77 for the lost pay period when she should have been placed in the position. Benningfield v. Citv of Houston, 157 F.3d 369,378 (5th Cir. 1998) (had plaintiff received full pay retroactively, claim would fail).

10 On numerous occasions, plaintiff had submitted

defective Forms 3971 in which she had requested multiple types of leave in the same request, or had requested COP, a category of leave for which she did not qualify because she did not at the time have a recognized on-the-job injury.

Further, plaintiff has produced no evidence of disparate treatment, i.e. that other employees did not have to resubmit claim forms or answer questions about their breaks.

Plaintiff also alleges that the USPS discriminated against her on the bases of sex and race when it issued a letter of warning on August 26, 1998. Defendant asserts that plaintiff has not set forth a prima facie case of discrimination because the letter of warning, which was expunged, did not constitute adverse employment action. See Cuenca v. Univ. ofKan., 265 F. Supp.2d 1191, 1209 (D.Kan. 2003) (letter of reprimand not adverse action where it did not have negative effect on employment); see also Benningfield, 157 F.3d at 377 (formal A WOL reprimand that was rescinded by internal procedures not adverse employment action); cf. Roberts v. Roadwav Exp., Inc., 149 F.3d 1098, 1104 (10th Cir. 1998) (20 written warnings were adverse actions because the more warnings an employee received, the more likely termination for further infraction would be). In this case, defendant expunged the warning letter through a grievance settlement dated September 22, 1998, and the record contains no evidence that the letter has impacted the terms and conditions of plaintiff's employment.

Plaintiff has not shown that the requests for re-submission of leave forms, inquiries about breaks, or the expunged warning letter constitute adverse employment actions. Defendant is entitled to summary judgment because plaintiff has not set out evidence of a prima facie case of discrimination based on these actions.

F. Failure To Promote To Clerk Stenographer Position

Plaintiff alleges that defendant discriminated against her on the basis of race and/or sex when it did not promote her to Clerk Stenographer. Defendant asserts that it is entitled to summary judgment because plaintiff has not presented evidence of a prima facie case of discrimination and even if she did, it had a legitimate, non-discriminatory reason for not promoting her to the position.

As set forth above, one of the elements of a prima facie case of failure to promote is that plaintiff was qualified for the position. See Amra, 232 F.3d at 796. Plaintiffs performance on the Clerk Stenographer examination rated a score of ineligible, which disqualified her from the position.

Further, even assuming that plaintiff established a prima facie claim, defendant has articulated a legitimate, non-discriminatory reason for the decision not to place her as a Clerk Stenographer - her test rating of ineligible. Plaintiff has not attempted to rebut the proffered legitimate reason.

Defendant is therefore entitled to summary judgment as to plaintiff s claim of race and sex discrimination based on the Clerk Stenographer position.

G. Ineligibility To Apply For Positions Requiring: Completion Of The ASP

Plaintiff complains that the USPS made non-supervisory personnel ineligible for certain positions of Customer Services Supervisor in the Kansas City metropolitan area if they had not completed the ASP program and then discriminated against her on the basis of race and sex by not selecting her for that program. Plaintiff concedes that she never completed the ASP program, and that she therefore is not qualified for positions which required completion ofthe ASP. As a result, she cannot establish the second prima facie element of this failure to promote claim. See Amra, 232F.3d at 796. Defendant is entitled to summary judgment on this claim.H. Rejection Of Plaintiffs Application For Stamp Distribution Clerk

Finally, plaintiff alleges that USPS discriminated against her on the basis of race and sex when it rejected her application for the position of Stamp Distribution Clerk. Defendant asserts that plaintiff has not set forth a prima facie claim of race or sex discrimination because she has not set forth evidence that she was qualified for the position. The position required that applicants apply by January 29, 1999, and plaintiff did not apply for the position until February 3, 1999. Even assuming that plaintiff stated a prima facie case, defendant has set forth a

legitimate, non-discriminatory reason for rejecting her application - it was received after the deadline. Plaintiff has presented no evidence to rebut defendant's proffered reason, and defendant is therefore entitled to summary judgment on this claim.

IT IS THEREFORE ORDERED that plaintiffs Motion To Compel Mail Delivery (Doc. #77) filed June 10, 2004 be and hereby is **OVERRULED.**

IT IS FURTHER ORDERED that Defendant's Motion For Summary Judgment On Plaintiffs Race And Gender Claims (Doc. #74) filed May 26, 2004 be and hereby is **SUSTAINED.** The Clerk is directed to enter judgment for defendant on all claims.

IT IS FURTHER ORDERED that defendant's Motion In Limine (Doc. #64) filed April 28, 2004 be and hereby is **OVERRULED** as moot.

IT IS FURTHER ORDERED that Defendant's Motion To Continue Trial (Doc. #84) filed August 18, 2004 be and hereby is **OVERRULED** as moot.

Dated this 19th day of August, 2004 at Kansas City, Kansas.

UNSIGNED

s/Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

FILED September 29, 2005

United States Court of Appeals Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KA THY V. WILLIAMS,

Plaintiff-Appellant,

v.

No. 04-3358 (D.C. No. 02-CV -2568-KHV) (D. Kan.)

JOHN E. POTTER, Postmaster General, United States Postal Service, Defendant- Appellee.

ORDER AND JUDGMENT.

Before O'BRIEN, HOLLOWAY, and BALDOCK, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.I(G). The case is therefore ordered submitted without oral argument.

Kathy V. Williams appeals from a grant of summary judgment in favor of the Postmaster General of the United States Postal Service (USPS), her employer.

[FOOTNOTE] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Williams alleges that the USPS discriminated against her on the bases of race, sex, religion, and disability and retaliated against her for protected activity, in violation

of Title VII of the Civil Rights Act of 1964 and the Vocational Rehabilitation Act of 1973. For the reasons stated below, we affirm.

I. BACKGROUND

Williams, an African-American woman, has been an employee of the USPS since 1987. In the present lawsuit, she claims discrimination by rejection for the Associate Supervisor Program, lack of consideration for promotions to Supervisor of Customer Services in two locations, denial of her bids on the positions of Clerk Stenographer and Air Records Processor, and unfair imposition of mandatory leave until her physician eased her work restrictions. She also makes general allegations of discriminatory and retaliatory activity resulting in harassment and unfounded disciplinary action.

On the Postmaster's first motion for summary judgment, the district court dismissed all but Williams' race and sex claims. During a motions hearing, thecourt invited the Postmaster to file a second motion on the remaining claims. It then denied Williams' motion to reconsider the initial entry of summary judgment, granted the Postmaster's second motion for summary judgment and entered judgment on the entire case. This appeal followed

.II. DISCUSSION

Because Williams is representing herself in this appeal, we must construe her brief liberally. *See Cannon* v. *Mullin,* 383 F.3d 1152, 1160 (lOth Cir. 2004),*cert. denied,* 125 S. Ct. 1664 (2005). Her first argument seems to be that she was denied due process of law by operation of the district court's administrative

procedural rule generally prohibiting *pro se* litigants from filing their submissions electronically. D. Kan. Admin. P. for Filing, Signing, & Verifying Pleadings &Papers by Elec. Means in Civ. Cases, § I(A)(2). Parties proceeding *pro se* are directed to file paper originals, which the clerk's office scans into the Electronic Filing System and maintains in a paper file. *Id.* at § III(B).

Williams alleges that certain exhibits attached to her response to the Postmaster's motion for summary judgment and to her motion for reconsideration were missing from the Electronic Filing System. Pyramiding on this allegation, she speculates that the district court failed to consider these documents. The docket, however, reflects that the documents submitted by Williams were filed and made electronically accessible, except exhibits

accompanying her motion for reconsideration. These documents were filed as part of the district court record, in accord with the administrative rule allowing the conventional filing of exhibits "that are not available in electronic form or that are too lengthy to electronically image, i.e. 'scan'" *Id.* at § IV ©). It is apparent that the district court had ready access to all of Williams' filings[1]. There is no factual basis for due process contention. As a result, the district court did not err in denying Williams' motion for postjudgment relief. Williams also mounts attacks on the content of the district court's summary-judgment orders. We review *de novo* a district court's grant of summary judgment. *Simms v. Okla. ex rel. Dep't of Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Summary judgment is appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Id.* "A disputed fact is 'material' if it might affect the outcome of the suit under the governing law, and the dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Allen v. Muskogeee, Okla.* 119 F.3d 837,839 (10th Cir. 1997). Unsupported conclusory allegations, however do not create an issue of fact. *See Salehpoor v. Shahinoor*, 358 F.3d 782,789(10th Cir.), cert. denied 125 S.Ct.47 (2004).

To survive summary judgment on her Title VII claims, Williams relies on the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). As we have explained:

McDonnell Douglas first requires the aggrieved employee to establish a prima facie case of prohibited employment action. . . If the employee makes a prima facie showing, the burden shifts to the defendant employer to state a legitimate, nondiscriminatory reason for its adverse employment action. If the employer meets this burden,then summary judgment is warranted unless the employee can show there is a genuine issue of

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[1] We note that the appellate paper record includes all exhibits filed by Williams. See 10th Cir. R. 30.3 (exempting a pro se appellant from appendix requirements and permitting a pro se appellant to proceed on the record on appeal).

material fact as to whether the proffered reasons are pretextual.

Plotke v. *White,* 405 F.3d 1092, 1099 (lOth Cir. 2005) (citations and quotations omitted).Using the *McDonnell Douglas* analysis, the district court carefully sorted through Williams' discrimination claims. It determined that Williams failed to demonstrate her prima facie case for most of these claims and, in instances which she did, she did not establish pretext. In making its ruling, the court informed Williams that her unsupported accusations of perjury and misrepresentation were an insufficient showing of pretext. We agree with the district court and affirm the entry of summary judgment on Williams' Title VII claims.

Williams' claim under the Rehabilitation Act is based on the Postmaster's failure to provide light-duty work to accommodate her lifting restriction from September 1998 through January 1999. To determine whether an individual is disabled under the Act, a court examines the nature and severity of the impairment, along with the expected duration of the impairment and the permanent or expected long-term impact of the impairment. *Doebele* v.*Sprint/United Mgmt. Co.,* 342 F.3d 1117, 1130 (lOth Cir. 2003) (discussing the Americans with Disabilities Act, which defines "disability" in the same way as the Rehabilitation Act, *see Nielsen* v. *Moroni Feed Co.,* 162 F.3d 604, 608 n.7 (lOth Cir. 1998)). Williams argues that the district court erred in concluding that she did not have a disability as defined by the Rehabilitation Act and that the Postmaster considered her as having a permanent disability. To the contrary, the district court correctly determined that Williams' four-month restriction was of insufficient duration to qualify as a disability under the Act. Furthermore, the record demonstrates that the Postmaster did not consider Williams to be permanently disabled. Accordingly, Williams failed to establish a prima facie case under the Act, and summary judgment in the Postmaster's favor was the appropriate disposition of her claim.

III. CONCLUSION

The judgment of the district court is AFFIRMED for substantially the reasons stated in the district court's orders for substantially the reasons stated in the district court's orders of May 5, 2004 and August 19, 2004.

As for Williams' "Motion[] to Compel Delivery, Extend Appellant's Time for Filing, for Appellee Sanction and Finding in Favor of Appellant," her motion already has been granted to the extent it asks for leave to file a reply brief. The remainder of the motion is denied as moot. The mandate shall issue forthwith.

Entered for the Court

Terence L. O'Brien
Circuit Judge

UNITED STATES DISTRICT COURT
for the
Tenth Circuit District of Kansas

KATHY V. WILLIAMS,)
Plaintiff-Appellant)
)
) No. 04-3358
v.) (D.C. No. 02-CV-2568-KHV)
) (D. Kan.)
JOHN E. POTTER,)
POSTMASTER GENERAL and
UNITED STATES POSTAL SERVICE,
Defendant-Appellee

Comes now Appellant seeking en banc consideration of this matter *"as necessary to secure and maintain the uniformity of this court's decisions"*; 10th Circuit; and which its panel decision conflicts with the authoritative decisions of the United States Supreme Court and United States Courts of Appeal.(Fed.R. App.P. Rule 35(b)(1) (A)(B)).

Appellant sets all arguments, evidence, exhibits and case citations as filed before this court in conjunction with the following of *en banc* hearing requirements submitted herewith:

CONFLICTS/UNIFORMITY:

The majority of the Court of Appeals have held that 'plaintiff/appellant' need not plead a prima facie case of discrimination under McDonnell Douglass Corp. v. Green 411 U.S. 792 (1973). In so doing, ordinary rules of assessing sufficiency of complaint apply in raising greater than an inference of discrimination. Scheuer v. Rhodes 416 U.S. 232,236(1974) Thereby Rule 8's applicability to all civil actions and specifically employment discrimination was setforth by Courts of Appeal.

This court ruled in Orr v. City of Albuquerque, 03-2287 (10th 2005),:

"at the prima facie stage of the McDonnell Douglass analysis, a plaintiff is only required to raise an inference of discrimination not dispel the non-discriminatory reasons subsequently proffered by defendant EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184,1193 (10th Cir. 2000). At the prima facie stage , the plaintiff's burden is "not onerous." Texas Dep't of Cmty. Affairs v. Burdine 450 U.S. 248,253 (1981 which is evidenced by the "small amount of proof necessary to create an inference of discrimination," EEOC v. Flasher Co. Inc., 986 F.2d. 1312 (10th Cir. 1992).

Rule 8 applied and was satisfied in this matter as defined by Court of Appeals 2nd Circuit in Sweirkiewicz v. Sorema N.A., by giving Respondent *clear notice of bases for claims and grounds upon which they rest.*

The 10th Circuit Court of Appeals ruled in Orr v. City,:

"non-discriminatory reasons advanced by an employer to dispel the inference of discrimination raised by an employee at the prima facie stage, it can not...defeat an employee at the prima facie stage".

Appellant suffered **adverse employment action** by Appellant's failure to promote, denial of Appellee's uninterrupted employment and failure to approve on-the-job injury work denial compensation, et al as prescribed by its guidelines and regulations. As such this Court cited the 11th Circuit Court's 2001 ruling in _____ v. Bd. of County Comm'rs, 256 F. 3d 1095, 1118 *"Actions which deprive a plaintiff of compensation which he otherwise would have earned clearly constitutes adverse actions for purposes of Title VII"* Orr v. City of Albuquerque, 03-2287 (10th Cir. 2005) and is comparative to the present matter before the Court.

Exemplified by the Court's citation of Orr v. City, Appellee's work denial forcing the use of Appellant's leave for an on-the-job injury *obligated use of sick leave which it severely diminished and was prevented from accruing additional*

amounts significantly altering reserves for future illnesses or early retirement and demonstrates adverse action. As affecting Williams, she suffered the loss of sick and annual leave, accrual of the same, lost wages, bonuses awarded, presently being awarded calculated by work during Appellant's work denial and non-payment/reimbursement as proscribed on-the-job injury work interruption.

This Court held that adverse employment action includes acts that "*constitute a significant change in employment status , such as hiring , firing, failing to promote, reassignment with significant different responsibilities or a decision of significant change in benefits*" Sanchez v. Denver Pub. Schs., 164 F. 3d 532 (10th Cir. 1998)[cite in part: 524 U.S. 76(1998)]. In Hillig v. Rumsfeld, 381 F. 3d. 1028, (10th Cir.2004), the Court expressly did not limit adverse employment actions to these acts as defined under the guise of examining each case's relevant and unique nature. Dick v. Phone Dir. Co. Inc., 03-4163 (10th Cir. 2005). This case falls under the stated acts which constitute adverse employment action with additional elements warranting examination.

Appellant submits to this Court en banc that summary judgment was not appropriate as " *the pleadings, depositions, answers to interrogatories and admissions on file together evidence* ***genuine issues of material fact*** *and thereby Appellant is entitled to judgment as a matter of law.* Fed. R. Civ. P. 56(c).

Appellant maintains had the District Court; and the Appellate panel in its stead; evaluated the totality of evidence ruling would be in Appellant's favor.

The panel's order and judgment which suggests Williams pro se *"mounts an attack on the district court's summary judgment order"* . Whereas Williams purports the presentation is a just and accurate presentation and/or argument of the facts before this Court based on the facts in evidence. Such is not intended as an attack any more so than all other legal pleadings in effort to be heard. Filings maintain by the evidence that the district court's findings are a **recitation** of Appellee's *proffered*

explanation. It is agreed that the district court had **access** to the evidence rendered by Appellant as Williams presented the documents on two occasions for filing with the court. Failure to properly document the filing of the same is not the greater issue as stated in filing with this Court. At issue is the district court's failure to consider Appellant's evidence as presented. In spite of the clerks failure to include notation and/or actual of exhibits within the ECF, such evidence was sufficiently documented within the content of filing to meet the reasonable expectation their existence and accessibility were made known to the court.

Evidenced by the district court's stated rationale for its rulings and orders of summary judgment in favor of Appellees, said ruling was based solely on Appellees' arguments. Failure to consider Appellant's exhibits excluded them from the standard of evidence totality and immunized the employer from liability. In so doing, the district court specifically states its ruling in favor of Appellee was based directly on information provided by Appellees' and is evidenced by its findings. Appellant asserts that Appellees' information is erroneous and proffered pretext misleading the lower court to rule based on erred conclusions.

This claim is supported by content of the lower court's Document 89. The district court judiciary cited its findings in re summary judgment for Appellees based on these erred elements. The district court's use of such error was rendered by Appellees without bases of fact and was/ is refuted by Appellant as proffered pretext supported by evidence. This is exemplified by judicial ruling as cited within Document 89 and recited herein:

1] Page 4: *Plaintiff purports to dispute many of defendant's factual statements, **but she does not refer to portions of the record on which she relies. Accordingly, the Court deems such facts as admitted.*** (emphasis added)

This is refuted by Appellant's filing; Document 72; and exhibits with corresponding listing of evidentiary documents as submitted to the Court. Document 72, Pages 59-63

specifically details attached documents. Each document is referenced within the content of said filing to ensure identifiable by its content. That the Court considered 'defendant's statements "factual" and by inference the non-existence of exhibits/evidence on record implies the lower court was not aware of the documents accessibility. As the majority of said documents were obtained from Appellee and not contraverted as authentic, the lower court had "record on which Plaintiff purported dispute". The lower court does not imply the evidence was insufficient but that it was non-existent '*within the record*'. Evidence clearly demonstrates Appellants' dispute with Appellees' *factual* statements are inclusive of the content and listing of evidence within Document 72. Thereby, the district court erred in admitting Appellees' facts as admitted. Thereby it ruling was faulty on those bases.

Further the district court's judgment stated facts relevant to each matter inconsistent with the facts of the case and evidence of record. Exemplified by Document 89, Page 7 where the court contends in direct contradiction to sworn EEOC testimonial transcript filed with the district court that:

The review board compiled each candidate's scores from the written examination, written application, supervisor evaluations and interviews. The board then selected for the ASP program the 26 candidates with the highest composite scores.

That this is the regulatory and governing method of selection is not argued. Appellant argues this is **not the method utilized by Appellees by their sworn administrative hearing testimony** and that Appellees' contradiction of previous sworn affidavits, the manuals governing compliance as stated evidences pretext.

Appellant submitted exhibits of sworn judicial transcripts, other documentation refuting the proper method was applied, et al evidencing the matter was not handled by Appellees' governing policy as stated by the district court. Hence, Appellees failure and inconsistencies led to Appellant seeking

resolution before the Court.

Appellant argued and argues that had this method been properly applied without discrimination, Williams which had out-scored other employees; the other employees having been assessed as ***unqualified for selection***; could not have been passed over for promotion and replaced by the unqualified applicants in accordance with a cumulative rating. The same is evidenced by Appellees' alteration of manuals and sworn testimony to support its pretext as supplied by Appellant to the court as exhibits of evidence. **(REFERENCE: Appellant's exhibit list filings with synopsis of Document 72 pages 59 through 63).**

3) Document 89, In its entirety: The district court relied solely on the pretext presentation of Appellees which Appellant's evidence as cited in Document 72 refutes. It is without doubt that Appellees would present its case most favorable and it was the district court's obligation to review **all** the evidence. The district court's stating that Appellant did not refer to evidence on the record in spite of identification in the content of the filing and listing of exhibits implies the court's failure to consider Plaintiff/Appellant's filing, exhibits and explains the complete reliance and recitation of Appellees' claims. In so doing, by whatever cause, the lower court erred.

The 10th Circuit Court's panel reference "*unsupported conclusory allegations*" of Appellant's evidence is in error. Appellant submitted into evidence: sworn affidavits, sworn depositions, sworn administrative judicial testimony transcripts, governing regulations, laws and other evidence *'conclusively supportive'* of case law and Appellants' allegations.

Williams presents to this Court that allegations of perjury, misrepresentation and pretext are supported by the evidence submitted to this and the district court evidencing discriminatory intent. Acknowledging Appellants' willful disclosure of evidence of its discriminatory intent was precipitated by Appellee's self-representation, the same effectively fuse the pretext steps behind the McDonnell

Douglass method eradicating the difficulty of uncovering evidence of discriminatory intent. Oxman v. WLS-TV, 846 F.2d 448, 454-55 (7th Cir. 1998).

Thereby, the employer's reasons in direct contradiction to the evidence proffered to the district court does not warrant summary judgment by the showing of **genuine issues of material fact.** McDonnell Douglass Corp. v. Green, 411 U.S. 792(1973).

AND that the district court by indirect inference does not imply that Appellant's evidence is insufficient but rather *non-existent*, it is reasonably inferred that Appellant's evidence - though accessible was not evaluated nor utilized as bases for the district court's findings.

Aside and because of Appellant's pretext rendered, this Court's panel decision conflicts with established precedent of this Court, laws and United States Supreme Court rulings:

Federal employers are charged with greater duty than federal grantees or private employers Southwestern Comm. College v. Davis 442 U.S. 397,410 (1979).

For federal employees, therefore non-discrimination requires more than mere equal treatment of disabled employees and job applicant and encompasses affirmative duty to meet the needs of the disabled workers and to broaden employee opportunity. Fedro v. Reno 21 F.3d 1391, 1938 (7th Cir. 1994).

This Court ruled in Woodman v. Runyon, 96-4104 (12/24/97) *that the United States Postal Service;* Appellant's employer and Appellee; *"**most certainly** had duty based on its existing policies to attempt to reassign [Woodman] as part of its duty to provide reasonable accommodation"* **and** *"had a duty to reassign pursuant to its existing policies pertaining to workers injured on the job".* Citing Shiring v. Runyon, 90 F.3d 827-32 (3rd Cir. 1996), the 10th Circuit noted in Woodman, *"Defendant employer is **obligated** to demonstrate it (has) complied with the various statutory duties placed upon it most esp. the duty to provide reasonable accommodation."*

10th Circuit applied and cited the 9th Circuit's interpretation of employer's duties under the Rehabilitation Act: *Section 501 and duty to reassign under 1992 amendments are mandates with which federal employers are obligated to comply.* In this matter, Appellees failed to meet their burden of proof Buckingham v. U.S. 998 F. 2d 735,741-42 (9th Cir.).

The burden shifted to Appellees by their pretext of Appellant's inability to be accommodated by Its admission that Appellant was performing the normal and usual duties of her job assignment at point of work-denial evidencing *the existence of a plausible accommodation* Borowski 63 F. 3d at 138.

The district court and panel's ruling conflict with the American with Disabilities Act, Vocational Rehabilitation Act, Civil Rights Act of 1964, U.S. Supreme Court and Circuit Court of Appeal rulings in disallowing Appellants' rendered pretext as qualifying under these laws.

In so doing, both courts erred in failure to apply 12112(2)©) under the Act(s) as was applicable.

AND that the source of pretext of work denial was unlawful Title 42, Section 12112(d)(1)(a) prohibiting medical examinations and inquiries by Title 42, Section 12112.4(A) and 5(A) .

In compliance with the governing laws and regulations this 10th Circuit Court ruled in Doebele v. Sprint /United Management Company .01-3372(2003) [specific citation: **3. Regarded as Disabled].** Appellant falls within the statutory definition when Appellees' supplied pretext for work denial asserted as a *covered entity* claimed *mistakenly* that Appellant "arms were affixed to her side" as evidenced by sworn EEOC testimony/transcripts of Patrick Clark and deposition of Jerome Barnes. Such incapacitation would *substantially limit major life activities* and is not precluded from the Act(s) when *the covered entity entertain misperceptions about the individual that one does not have. ibid* Doebele.

10th Circuit ruled/upheld that *"An individual rejected from a job because of myths, fears and stereotypes" associated with*

disabilities would be covered under this part of the definition of disability... whether or not the individual's actual physical or ***mental condition would be considered a disability under the*** *first or second part of this definition.* (citing 29 C.F.R. pt. 1630, App. 1630.2(l).

Appellees' admission, sworn testimony of witness and Appellant's admission to performing her regular job duties demonstrate the pretext of Appellees' proffered reason. Further, where Appellees' proffered reason **not** pretext it can be reasonably inferred that such drastic inability to move one's arms at all or the after-affects would not have been of short duration. In Doebele, the court concluded: ***regarded as unable*** *to perform the activity of working* raises an **issue of fact.**

The 10th Circuit ruled in Kelley v. Metallics West , 04-1051(10th Cir.) :

An employer who is unable or unwilling to shed his or her stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limits created by his or her own faulty perceptions.

and

> *...reasonable accommodation makes no distinction between employees who are actually disabled and those who are merely* ***regarded*** *as disabled.*

Citing this 10th Circuit Court:

"We conclude that an employer must reasonably accommodate employees ***regarded or perceived as*** *disabled."* (emphasis added).

Appellant argues evidence supporting Appellees proffered reasons were false do not preclude qualification as disabled. Further that Appellees' admissions that Appellant was performing regular job duties while proffering 'arms affixed/immobile' sufficiently produces evidence for a reasonable jury to conclude that covered discriminatory reasons were Appellees' motivating factor under the Act 42 U.S.C. 2000e-2(m)

In spite of the direct evidence filed with the Court *2000e-2(m) does not incorporate a direct evidence requirement See e.g. 42 U.S.C. 2000e-2(k)(l)(A)(I)* 299 F.3d 838 (9th Cir.).

Applying this Court's 'termination of employment' to be inclusive of 'cessation of employment, Appellant asserts applicability of Copelin-Brown v. New Mexico State Pers. Office 04-2099 (10th Cir. 03/02/05) as employment denial *"can only be for specific reasons, his or her expectation of continued employment is sufficient to invoke the protections of the Fourteenth Amendment" West v. Grand County 967 F.2d 362,366 (10th Cir. 1992).*

Appellant's rendered evidence supports this Court's rulings of *determination* by each of the three ways cited in Green v. State of New Mexico, 04-2160 (10th Cir. 08/31/05):

(1) with evidence that the defendant's stated reason for the adverse action[s] was false

(2) with evidence that the defendant acted contrary to company policy prescribing the action to be taken by defendant under these *circumstances and*

(3) defendant acted contrary to unwritten policy or contrary to company practice when making the adverse employment decision

Evidence rendered to the Court demonstrate at least one of this three prong-test as applicable to each of Appellant's complaints and in most instances all three.

Supreme Court Footnotes of McDonnell Douglass (ibid) upheld that actions as taken by Appellee against Appellant are unlawful.

Section 701(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1) in pertinent part provides: " It shall be an unlawful employment practice for an employer... to fail or refuse to hire or to discharge any individual, or otherwise discriminate against an individual in respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin..."

Section 704(a) of the Civil rights Act of 1964, 42 U.S.C. 2000e-3(a) in pertinent part provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter

Appellant's evidence supports Appellee *failed and refused to hire* [promote], *temporarily discharged*[1], *compensate* by its failure to approve Department of Labor Compensation of forced leave usage during work denial and on-the-job injury medical care *because of such individual's race, color, religion, sex or national origin..."* and *because [s]he has opposed any practice made an unlawful employment practice by this subchapter.*

Appellant allegations of pretext adheres to the United States Supreme Court and this Court's definition of pretext with supportive evidence as filed. In Miller v. Eby Realty, 03-3307,04-3076 (10th Cir. 01/26/05),this Court defined the existence of pretext:

" *when an employer does not honestly represent its reasons for terminating an employee (source citation omitted). (pretext is defined as (1) "An ostensible or proffered purpose; an excuse" and (2) "An effort or strategy intended to conceal something").*

---

[1]Duration of work denial was shortened by Appellees' inability to persuade the Missouri Division of Employment Compensation to withhold benefits of Appellant during work denial. As pretext, Appellees advised Missouri Division of Employment that Appellant requested leave of absence and was not qualified for unemployment benefits. Missouri Division of Employment rejected Appellees' claim based on the evidence. Appellant's award of unemployment compensation was **sole motivating factor** of stipulations and allowing to return to work.

Appellant asserts in accordance with the Miller conclusion:

"*it is permissible for the [factfinder] to infer the ultimate fact of discrimination from the falsity of the employer's explanation*" Reeves, 530 U.S. at 147 *and that such inference is consistent with the general principle of evidence law that the factfinder can consider the dishonesty about material fact as affirmative evidence of guilt.*

Appellant utilizes United States Code in support of allegations of perjury and supplied the court(s) evidence in support of the same.

United States Code Title 18, Section 1623 with emphases added (a)©)(1)(2) , Section 1622. Appellant utilizes Section 1621 in its entirety averring its applicability to this matter. That Appellant's allegations are supported by evidence that Appellees in (1) ***having taken an oath before a competent tribunal(EEOC hearing transcripts)****, officer* ***(depositions) written testimony, declaration, deposition and certificate (affidavits)*** *authorized by the law(s) of the United States* (2) willful subscribes as true any material matter known not to be true is guilty of perjury.

Appellant asserts evidence supplied the Court evidences Appellees' varied, multiple alterations and direct contradictions of testimony, proffered pretext as within the Codes' stipulation and definition of perjury.

Comes now Appellant; motivated by quest for ***The LAW*** to be uniformly applicable and enforced and guaranteed to all citizens; convinced that **reading, examination and evaluation** of the evidence as rendered by Appellant **each allegation** is **supported by genuine issue of material fact(s)**. Ergo, Appellees' proffered rationale demonstrate an extreme **case**/instance of pretext. AND that Appellant has rendered sufficient and supportive evidence to have survived summary judgment and been awarded under legal requirements applicable with and/or without board certified representation. Appellant asserts that the law clearly refutes Appellees' actions

against her and that such infringements against are supported by the evidence.

Appellant asserts the court erred in basing Its judgment solely in consideration of Appellees' proffered evidence without consideration of unrefuted and contradictory evidence by Appellees as filed by Appellant. AND that the 10th Circuit panel and district court's failure to apply the third prong of the ADA/VOC.REHAB. "Regarded as disabled" severely diminishes the intent and statutory application of the law. As did the lower courts application of a higher standard than the plain language of Rule 8. In so doing, Appellant asserts the decision(s) conflict with decisions made by the U.S. Supreme Court, authoritative decisions of U.S. Courts of Appeal, Congress and case law.

For this cause, Appellant asks this Court *en banc* to find in favor of Appellant awarding damages sought by filing with this Court.

Respectfully Submitted,

s/Kathy V. Williams
Pro-se Plaintiff/Appellant
7216 Lathrop Avenue
Kansas City, Kansas 66109-1708
913-334-5906

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KATHY V. WILLIAMS,
Plaintiff - Appellant,

v.

No. 04-3358

JOHN E. POTTER, Postmaster General,
United States Postal Service,
Defendant - Appellee.

ORDER
Filed November 21,2005

Before O'BRIEN, HOLLOWAY, and BALDOCK,
Circuit Judges.

Appellant's petition for rehearing is denied.
The petition for rehearing enbanc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CLERK, COURT OF APPEALS

s/ Deputy Clerk

UNITED STATES DISTRICT COURT

KATHY V. WILLIAMS,)
Plaintiff)
v.) 10th Circuit Appeal #: 04-33580
) Dist./Ag.: 02-2568-KHV
JOHN E. POTTER,)
POSTMASTER GENERAL,)
UNITED STATES POSTAL SERVICE,)
Defendant)

ORDER

Kathy Williams, pro se, brought suit against John E. Potter, Postmaster General of the United States Postal Service ("USPS"), alleging that the USPS discriminated against her on the bases of race, sex, religion and disability, and retaliated against her for protected activity, in violation of Title VII of the Civil Rights Act of 1964("Title VII"), 42 U.S.C. § 2000e et seq. and the Vocational Rehabilitation Act of 1973 ("Rehabilitation Act") 29 U.S.C.§791,794. The Court granted summary judgement for the defendant. Plaintiff appealed the Tenth Circuit affirmed. Williams v. Potter, 149 Fed. Appx. 824(10th Cir. Sept. 29, 2005).

This matter comes before the Court on plaintiff's Motion for Review(Doc. #114) filed December 19 2005. Plaintiff asks the Court to (1) deny the costs which the Clerk of Court taxed to plaintiff and (2) reconsider her claims of discrimination based upon all the evidence. Defendant responds that it is entitled to the costs awarded under Fed. R. Civ. P. 54(d). Defendant also points out that the law of the case prevents plaintiff from re-litigating her prior claims. See Arizona v. California, 460 U.S. 605,618 (1983).

For substantially the same reasons set forth in defendant's response, the Court finds that plaintiff's Motion for Review(Doc. #114) filed December 19, 2005 should be and hereby is OVERRULED. IT IS SO ORDERED.

Dated this 22nd day of February, 2006 at Kansas City, Kansas.

s/Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge

Other Events

2:02-cv -02568KHV Williams v. USPS Postmaster Gen
CASE CLOSED on *08/19/2004*
U.S. District Court
District of Kansas

Notice of Electronic Filing

The following transaction was received from mjm, entered on 12/16/2005 at 6:55 AM CST and filed on 12/16/2005
Case Name: Williams v. USPS Postmaster Gen
Case Number: 2:02-cv-2568
Filer:
WARNING: CASE CLOSED on 08/19/2004
Document Number:.1:1
Docket *Text:*
Costs Taxed in the amount of $ $4,100.27 against plaintiff Kathy V. Williams. plus interest as set forth in 28 U.S.C. 1961 which is 4.35% re Bill of Costs[1O9] (mjm,)
The following document(s) are associated with this transaction:
Document description:Main Document
Original filename: n/a
Electronic Document Stamp:
. [STAMPdcecfStamp.JD""1028492125[Date= 12/16/2005] [FileNumbeF808748J]
2:02..cv-2568 Notice will be electronically mailed to:
David D. Zimmermandavid.zimmerman@usdoj.gov, usaks.ecfkcciv@USDOJ.GOV
2:02-cv-2568 Notice will be delivered by other means to:
Kathy V. Williams
7216 Lathrop A venue
Kansas City, KS 66109-1708

https:lledksd.circ lO.dcn/c.gi-binlDispatch.pl?645982127159143
12/16/2005

UNITED STATES DISTRICT COURT

KATHY V. WILLIAMS,)
Plaintiff)
) 10th Circuit Appeal #: 04-33580
) Dist./Ag.: 02-2568-KHV
v.)
)
JOHN E. POTTER,)
POSTMASTER GENERAL,)
UNITED STATES POSTAL SERVICE,)
Defendant)
)

APPEAL/MOTIONS

I.

Comes now Plaintiff in appeal of costs taxed by assistant U.S. Attorney David Zimmerman on behalf of defendants: United States Postal Service for **protected activity** against Plaintiff in U.S. District Court of Kansas at Wichita in the amount of four thousand three hundred fifty four dollars and seventeen cents ($4,354.17) with disallowance of requested monies as applicable in all **civil** matters and reduced by Wichita Manager Miller to four thousand one hundred dollars and twenty seven cents($4,100.27).

Title VII, EEOC Management Directive 715 and its Compliance Manual Section 8: Retaliation and all laws derivative of the same prohibit statutory retaliation defined as *"any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or from engaging in protected activity."* This protection applies to Plaintiff in this matter as an *"individual challenging*

employment discrimination under the statutes enforced by EEOC in EEOC proceedings, state administrative or ***court proceedings, as well as in federal proceedings,*** *et seq.*

Plaintiff presents to the court Defendants' and Its counsel's actions are liable for retaliatory practice in filing of costs taxation on the bases that they did and/or should have known such action is unlawful. Retaliation provisions prohibit in its central purpose that adverse actions of *unfounded civil charges that are likely to deter reasonable people from pursuing of their rights of protected activity and undermines the effectiveness of the EEO statutes and conflict with the language and purpose of anti-retaliation provisions.*

By filing such action before this Court, Defendants exhibit direct evidence: *"any written statement by a respondent official that s/he undertook the chargeable action because the party engaged in protected activity"*; that retaliation against Plaintiff for protected activity is and was Its motivation for.

Governing Laws, Directives and the Courts have defined the retaliation provisions and prohibit any discrimination that is reasonably likely to deter protected activity which Defendant's action clearly serve to hinder. Such taxation negates the primary purpose of anti-retaliation provisions which is to *maintain unfettered to statutory remedial mechanisms, harms public interest by deterring others from filing a charge, undermines the effectiveness of EEO statutes and conflicts with the language and purpose of anti-retaliation provisions.*

Defendants and officers of the Court, specifically of the U.S. Attorney General's assistant are reasonably expected to have knowledge and/or be able to determine 5 C.F.R.724 preclude claims against employees under the NO FEAR ACT. The agency's obligation as defined by 5 C.F.R. 724.103 et seq. states: *All reimbursements to the Judgment Fund covered by the NO FEAR ACT*

*are expected to be **fully collectible from the agency.***[1]

By filing such action before this Court, Defendants exhibit direct evidence: *"any written statement by a respondent official that s/he undertook the chargeable action because the party engaged in protected activity"*; that retaliation against Plaintiff for protected activity is and was Its motivation.

Plaintiff seeks the Court deny/set aside taxation as unlawful and exercise its power and authority to find cause and action against Defendants' prohibited act. Herein making motion for dismissal of all costs taxed as assessed against Plaintiff as disallowed by direct connection to protected activity in Plaintiff's filing of employment discrimination charge(s) before this Court. Plaintiff further moves and seeks judicial action and ruling against Defendant and Its representative for direct evidence of retaliatory activity by award to Plaintiff the maximum amount allowable under the law.

II

Comes again Plaintiff arguing that the direct evidence of retaliation for protected activity by Defendants returns all action IN RE this matter to the jurisdiction of this Court. The agency's effort to tax costs to Plaintiff for activity covered by the NO FEAR ACT is blatant demonstration of both Its actions against Plaintiff and Its expectation that this Court will accept Its requests with prejudice.

WHEREAS Plaintiff maintains had her submitted evidence been reviewed **without prejudice** from inaccurate presentation by the U.S. Attorney's Office, the Court by evidence and legal precedent would have found in Plaintiff's favor.

Defendants' present unlawful action returns the matter in its entirety to the jurisdiction of this Court. With or without precedent, the Court has authority to re-examine the case in its entirety taking into consideration the facts and evidence which

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[1]Plaintiff, Pro Se was highly aggrieved by such taxation/charges until research revealed its unlawful nature

judiciary failed to consider at ruling.

HEREWITH and by the power and authority vested in this Court, Plaintiff asks the Court
re-examine submitted evidence which the court's earlier finding implies it was not aware was filed for consideration and review. By complete examination of evidence submitted by Plaintiff, Pro Se; versus presumption of Defendants' counsels accuracy in reporting; Plaintiff continues to maintain that consideration of the sworn testimony and its variations, EEO transcripts, depositions and other documentation as filed by Plaintiff into evidence demonstrate validity of the charge of discrimination. And that had ALL evidence in this matter been reviewed and considered, the erred presentation by Defendants' counsel demonstrates pretext.

Defendants' return to this Court's jurisdiction in violation of anti-discrimination clause(s), NO FEAR ACT, Title VII anti-retaliation proviso, and all other governing laws and statutes prohibiting said action reinstates this Court's authority to re-examine and re-consider its earlier finding(s). The Court's present knowledge that evidence was excluded from EFS and its docketing statement as filed by Plaintiff and Defendants' present unlawful act return the matter to this Court's purview. In doing so, Defendants' afford this Court to review its earlier determination and rectify with justice based on the evidence of pretext, legal precedents and governing laws. Plaintiff also seeks finding in her favor by the Courts award as sought in the matters of requested review.

Court ruling and award in Plaintiff's favor on this matter seeks avoidance of further delay of justice, and as issuance of resounding message Defendants' are accountable to the law as any and all other entities and their involvement in action(s) prohibited by law will be redressed by the Court.[2]

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[2]Let the Court be advised of Defendants' resumption of harassment; herein and at the workplace; upon Its notification of the 10th Circuit's removal implies expectation of this Court to

(... but to do justly. Micah 6:8)

s/Kathy V. Williams, Pro Se
7216 Lathrop Avenue
Kansas City, Kansas 66109-1708
913-334-5906

CERTIFICATE OF SERVICE

By affixing my hand, I affirm five(5)page Motion(s) and Appeal in response to unlawful taxation were filed in compliance with Wichita's five(5) day appeal requirement notification:

1) electronically at esubmissions@ca10.uscourts.gov.
2) hand-delivered hard copy filed at the night deposit of the United States District Court at Kansas City, Kansas,
3) faxed to Wichita Tax Division/District Court at 316-269-6116

and 4) mailed regular first class mail to Defendants' counsel: David Zimmerman at the United States Attorney General's Office 500 State Avenue KCK 66101

On or Before December 20, 2005.

s/Kathy V. Williams, Pro Se
7216 Lathrop Avenue
Kansas City, Kansas 66109-1708
913-334-5906

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to uphold unlawful activity.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KATHY V. WILLIAMS,)
Plaintiff)
)Case No. 02-2568-KHV
)
)
v.
)
JOHN E. POTTER,)
POSTMASTER GENERAL,)
UNITED STATES POSTAL SERVICE,)
Defendant)
)
)

OBJECTION to and APPEAL of MEMORANDUM AND ORDER

Comes now Plaintiff, pro se by election pursuant to Federal Rules of Civil Procedure 60(a): clerical mistakes, (b)(1): mistakes, inadvertence, (b)(3): fraud, misrep. sentation of adverse party and (b)(6) all other reasons justifying relief from operation of the judgment seeking the mercy and justice of this Court by demonstration of evidence contradictory to alleged facts which the Court's states Its ruling is based on.

Said facts are representative of Defendants' pretext contained in Motion for Summary Judgment without consideration of Plaintiff's Response and rendered evidence as supportive opposition to pretext and the Court's stated facts.

The Court's duplication of Defendants' fraudulent claims as fact include Defendants' typographical error which review of supplied evidence reveals.

THEREFORE, Plaintiff petitions the Court to set aside the Memorandum and Order in the interest of justice and hear

Plaintiff's plea for justice with supportive evidence. Plaintiff asserts the Court's purview, authority and privilege to said action as judicious.

Plaintiff seeks specified remedies and relief by this Court's independent action which is not limited by Fed. R. Civ. Proc. 60(b).

THEREFORE, Plaintiff objects to and appeals the Court's Memorandum and Order by refutation re-presenting and expounding on evidence in contradiction to the stated facts seeking assessment of rendered evidence and erred allegation as fact. Plaintiff appeals to the Court to be heard and asks the Court to set aside its Memorandum and Order of 05 May 2004 and deny Defendants' request for and granted opportunity to re-present request for summary judgment in the interest of justice.

Plaintiff asserts such review is mandated by the Court's objective to render justice by prudent consideration of Plaintiff's arguments and evidence. The Court's acceptance of misrepresented and intentionally erroneous statements by Defendants' counsel errantly misled the Court. Plaintiff prays the Court justly assess Defendants' blatant abuses, perjured affidavits and testimonies and disregard of the laws this Court is delegated to uphold and enforce.

Pro se Plaintiff advises the Court that copies of referenced, supportive documents cited within the Plaintiff's Response to Defendants' request for summary judgment were banded separately when dropped in the Court's night deposit. If the documents failed to be properly attached to Plaintiff's response, this bundle should remain unidentified with the clerk's office. Plaintiff's response as delivered to Defendants' evidences inclusion.

FURTHER, the Court's electronic filing system is inaccessible to pro se Plaintiff disallowing determination of accuracy in filing. Plaintiff acknowledges the possibility of either cited factors may have reflected on the Court's assessment and maintains the evidence supports Plaintiff's assertions and renders herewith identical and further evidence

in support of the same.

WHEREAS, Plaintiff has been unable to ensure accuracy of previous filing this document contains details of information included to render check and balance to the hearers of these facts. Plaintiff is attaching herewith referenced supportive evidence. Each exhibit bears Plaintiff's handwritten numeric indicator referenced to the separate listing of all attachments rendered with the amount of pages. Plaintiff affirms this appeal contains seventy-nine(79) pages inclusive of exhibit list's with co tinued arguments, certificate of service and the cited exhibits as indicated with number of pages. Electronic transmission should reflect Plaintiff's total pages submitted.

Plaintiff's opposition to Defendants' motion for extension based on failure to submit within established guidelines without extenuating circumstances or valid rationale created undue hardship on the Plaintiff and was expressed in Opposition.

Plaintiff acknowledges the Court's ruling and apologizes for pro se representation which may assisted Court's conclusions contradictory of the evidence in this matter. Plaintiff's request for denial of Defendants' extension, inability to proofread electronic filing contents and creation of undue hardship on Plaintiff did render pertinent, supportive documents and excerpts to Defendants' misrepresentations contained within Motion for Summary Judgment .

Plaintiff's re-submission of transcript presents testimony noted by page number followed by colon referencing a specific line, the hyphen translates 'through' to include information between the two points.

WHEREAS, Plaintiff asserts the alleged Facts utilized by the Court is duplication of fraudulently misrepresented arguments rendered by Defendants' representative to which Plaintiff's Response rendered opposing arguments exhibiting inaccuracies within Defendants request for judgment. Plaintiff asserts officers of this Court deliberate misrepresentations and erred presentations obstruct justice

wherein legal ramifications and prohibitions need attach. Plaintiff requests the Court's review and base conclusion of facts on Plaintiff's arguments and supportive evidence which contradict Defendants' contentions in determination of a fair and judicious ruling.

Plaintiff addresses the presented Facts within the Court's Memorandum and Order submitting Plaintiff's evidence as supported and capable of withstanding close scrutiny of accuracy by this Court. Plaintiff contends inaccuracy of the fact challenges and invalidates all conclusions drawn from the same.

Plaintiff asserts clear evidence of pretext is demonstrated by "such weaknesses, implausibilities, inconsistencies incoherence and contradictions in the Defendants' proffered legitimate reasons for its action that a reasonable fact-finder can rationally infer them as unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons". Plaintiff rendered this information in response to summary judgment and re-submits it at this time with additional exhibits.

WHEREFORE, Plaintiff acknowledges Defendants' various alterations under oath of pretext can be confusing to non-postal and unaffected hearer of facts and *sampling* of evidence supporting this claim required Plaintiff's concerted effort to restrict to sizing comparable to Defendants motion took great effort. Plaintiff alleges said variances, falsified documentation and Defendants' perjured testimonies occurred at Defendants' determination each pretext unsupportive of its claims of justification. FURTHER, Plaintiff asserts Defendants' need and practice of alteration and variances evidence pretext for action.

Plaintiff has massaged this document to reduce without loss of demonstration.

All issues withstanding, justice is not served without the Court's reconsideration based on Its inaccuracies purported as fact. Plaintiff seeks the Court's judicious and thorough review.

PLAINTIFF'S ASSERTION OF CONTRADICTION of COURT'S PRESENTED FACTS

A) Associate Supervisor Program(ASP)

Error exists in the Court's contention that "The review board compiled each candidate's scores from the written examinations, written applications, supervisor evaluations and interviews. The board then selected the 26 candidates with the highest composite score."

It is Plaintiff's assertion and agreement with this Court that this is a description of procedural requirements for the application process. Plaintiff's complaint is based on facts in evidence from sworn testimony evidencing Defendants' failure to adhere to these requirements and pretext for said failings.

Plaintiff asserts the impossibility for ASP candidates returned to the selection pool post-denial based on scores from their written examination, written applications and supervisory evaluations to have exceeded Plaintiff's ranking as required by Defendants' rules and regulations of placement based solely on the subjective interview.

Plaintiff submits evidence of Defendants' contradictions in sworn affidavits, testimony and additional exhibits evidencing pretext.

A1. Defendants' representatives sworn affidavits regarding ranking of ASP candidates by cumulative scoring of all facets of ASP testing and qualifications establishes knowledge of Defendants' governing rules and procedures in hiring placement.

A2. Defendants' by refute sworn affidavit statements of cumulative ranking by rendering sworn testimony at administrative hearing basing ASP ranking solely on the interview.

A3. Plaintiff asserts Defendants' alteration of sworn pretext derivative of Defendants' inability to justify Plaintiff's exclusion from ASP placement based on Its governing rules, policies, CEB guidelines, regulations and civil laws

prohibiting discrimination.

SUPPORTIVE EVIDENCE:

A4. Evidence of this is demonstrated by the Defendants' rendering pretext as explanation and later rendering alternative polar opposite as correction explanatory pretext evidences each explanation as unjustified and rendered as pretext.

Re-presented herewith are the affidavits of ASP review board members: John Coolidge, Bruce Sanders, Pat Barba and L. Rosemary Goldblatt, two affidavits and letters dated 13 December 1996 and 07 January from the relevant coordinator of the ASP program: Rena Edwards - letters demonstrative of Plaintiff's earlier interview scheduling based on ranking and deposition testimony of relieving program coordinator: R. Dean Alberti. Each of these statements demonstrate procedural requirements for the scores to be a compilation of all factors.

In demonstration of Defendants' pretext of rationale for exclusion of Plaintiff based on the
required elements, Plaintiff presents sworn testimony rendered during administrative EEO proceedings of Coolidge, Sanders, Barba, Goldblatt and Edwards in contradiction to their previously sworn affidavits.

Plaintiff asserts that Defendants' realization of the impossibility of non-selection utilizing a
cumulative score led to perjured testimony of the selection process.

A5. Patricia Barba testified; 583:16-584:5, 584:6-22; 586:12-587:18; in direct contradiction to the sworn affidavit that the interview was considered separately excluding all other criteria. Barba attests to scoring distinctions between interviewed applicants 594:3-15.

A6. Bruce Sanders testified to the grouping distinction of applicants 647:4-1;.651:8-22;653:5-18 and 653:5-654:23. Sanders testified the interview was a major part of the evaluations and said it bore greater weight than the other four elements 637:24-638:19.

A7. Rosemary Goldblatt testified contradicting the culmination of scoring by identifying the interview as the sole basis of selection during the administrative hearing 677:17-678:22.

A8. Rena Edwards' sworn testimony altered the response contained in her sworn affidavit 692:23-693:20 when she identified the interview as the only factor for selection into ASP. Edwards testifies to the distinction between the seventeen of which Plaintiff' scoring rated 691:6-14;700:4-19 and the inclusion of all seventeen excluding Plaintiff 701:5-704:14:6. Edwards supplied statement; herein attached; references 'unsuccessful candidates' which were later included in the ASP though they held ratings lower than Plaintiff preceding interview. Plaintiff asserts this is evidentiary of the separate classification which could not disallow placement.

A9. John Coolidge testified to the scoring of the 17 which Plaintiff was included 510:11-21 and 511:15-512:17; 518:23-519:4 and 567:15-568:11. Coolidge's supported his affidavit by sworn testimony of only 17 applicants meeting the established ASP criteria 519:21-520:15. In spite of efforts to lead Coolidge to alter previous sworn testimony, Coolidge maintained the culmination of scoring 528:24-532:3. After much judicial coercion/leading Coolidge partially rescinded testimony regarding cumulative scoring by placing greater merit on the interview 569:10-571:21.

Plaintiff asserts Coolidge as the first witness from this group had not been apprised of Defendants' new pretext for exclusion of Plaintiff.

A10. Plaintiff renders test scores referenced in sworn testimony during the administrative hearing asserting that this document is purposely fabricated for Defendants' pretext. Plaintiff asserts the form's failure to support sworn testimony and the inability to extrapolate the 17 from this listing which rates initially disqualified applicants highest and in contradiction to Defendants' governing rules of selection as applicable for interviewing. Plaintiff alleges this document is

falsified to support Defendants' contention and can not be reconciled to Defendants professed selection process.

A11. Plaintiff asserts Defendants' pretext of reason for elimination from the ASP led to their supply of falsified documents including misrepresentation of the ASP guidelines and manuals at the administrative discovery stage. Defendants' false documentation was expressly to eliminate the governing regulations requiring composition scoring of all ASP elements in effort to support its newly devised pretext for Plaintiff's elimination. Plaintiff asserted then and now the supplied documents as falsified and failing to exemplify copies; sample attached; she had obtained from and unknown to Defendants' pre-filing of complaint of discrimination.

A12. Plaintiff supplies sample documents as supplied during discovery through the United States Attorney General's office demonstrative of variations supplied by Defendant. Plaintiff points out the referenced page numbers of information supplied during administrative discovery in comparison to that supplied by the USAG of the Program Coordinator's Guide. These discrepancies demonstrate a deliberate attempt by Defendants' to create falsified documents as evidence in support of their pretext of rationale for exclusion of Plaintiff from the ASP.

A13. Information obtained during federal discovery of ASP guidelines and manuals refute the altered testimonies placing greater weight on the interview process for ASP by designation of interviewing as optional (1c-0032 and 1c-0042) and requirement of cumulative information from both " the application and the interview" (1c-0063).

A14. Information regarding call-back sessions (1c-0238) and documentation supplied by Defendants' some ASP applicants attendance at the call-back sessions can not be aligned with the classification of listed ratings of *Excellent, Strong or Minimal*. Plaintiff alleges the falsification of the listed ratings form supplied by Defendants and attached herein as created in support of Defendants' pretext for Plaintiff's exclusion. Comparison of the list of candidates entering ASP

as supplied by Defendants', Plaintiff's certain knowledge or attendees and the incomplete sample listing of 'call back' attendees can not be reconciled to guidelines and regulations governing Defendants' selection process. This information is rendered to the Court as evidence of Defendants' pretext for exclusion of Plaintiff from ASP.

A15. Plaintiff submits a sample form(1b-0101) dictated by guidelines for retention by Defendants' (1b-0099) not submitted into evidence. Plaintiff contends this form nor any comparable renditions as required has been or can be supplied by Defendants' due to reflection exculpating Defendants' and their pretext. Documentation of Defendants' contention of the interview as sole determining factor was supplied by scoring reflective of and solely from interview and offered as submitted by Defendants.

A16. Plaintiff renders document from 2003 discovery through Defendants' representative - United States' Attorney General's assistant; hereinafter USAG; marked 1c-0605 demonstrating Defendants' guidelines regulating selection process which clearly stipulates and affirms national postal ASP requirement of **all** components for assessment into this program.

A17. The evidence supports Plaintiff's contention that Defendants' exclusion can not be justified. Perjured testimony; as sworn at administrative hearings; of representatives of and witnesses for Defendants', falsification of and failure to disclose documents by Defendants' support Plaintiff's contention of impossibility for initially non-qualified; (those candidates who were not within the 17); applicants' ratings to exceed Plaintiff's by interview scores as pretext to justify Plaintiff's exclusion from ASP.

A18. Defendants' failure to render honest, consistent justification for Plaintiff's non-admission to the ASP demonstrate their decision was resultant of discriminatory, illegal action.

A19. Plaintiff further asserts request for completion of ASP evaluation was expressly ***not*** sought of R. Dean Alberti rather

of A. Kostus. Plaintiff's asserts non-request for completion of application by Alberti based on deliberate non-supervision of Plaintiff as acting-supervisor and is demonstrated by Plaintiff's ASP application's references of supervisors wherein R. Alberti is not cited. Kostus' completion was pre-Alberti. Plaintiff's seeking approval of Kostus' completion from her chain of command/Alberti led to Alberti's insistent volunteering to complete the form. As Kostus was no longer in Plaintiff's chain of command nor retained acting-managerial status, Alberti's offer superseded Kostus by ranking and had to be submitted.

A20. Alberti's inclusion of information relative to Plaintiff's previous EEO action cause the revival of this complaint. This inclusion led to Plaintiff's contacting of the Defendants' internal EEO officers and requisition to initiate responsive complaint. Alberti testified at administrative hearing to rewriting Plaintiff's ASP evaluation and completion of EEO affidavit regarding the same 485:1-23.

A21. During deposition of 2003, Alberti testified he removed information from Plaintiff's ASP application without investigation or verification 78:22-79:21. Plaintiff asserts Alberti's inclusion of erroneous information in promotional evaluation as detrimentally reflective of Plaintiff's performance precludes managerial removal without verification. Plaintiff further asserts the information Alberti included was erred but in reference to the May 1994 EEO incident. Alberti's action necessitated Plaintiff's advising Alberti of EEO and contact with Defendants' internal EEO office for removal.

A22. At 2000 administrative hearing, Alberti's response to inquiry regarding contact with Defendants' internal EEO office testifies to filling out an affidavit "on that issue too" 485:19-21 referencing inclusion of protected activity in ASP evaluation of Plaintiff. Plaintiff asserts said inclusion, exclusion and contacts during the ASP process breached and nullified the previous EEO agreement and settlement and serves as temporal nexus.

A23. Alberti testified during 2003 deposition as Defendants' ASP coordinator in 1998-1999 year range, by inference immediately preceding Rena Edwards 8:8-11. Alberti testified to 1997 knowledge that only 17 applicants for Defendants' ASP qualified of which Plaintiff was one of the17 at 98:8-21. Alberti testified at deposition to Defendants' ASP ranking included all aspects of the process 143:3-19.

A24. Plaintiff asserts review of Defendants' ASP manuals and copy of excerpts in verification of Defendants' governing regulations *pre*-initiation of complaint and rendered to USAG pre-submission of Defendants' discovery documents. Plaintiff attaches samples of self-obtained, Defendants' falsified renditions during administrative process and USAG discovery supplied.

Plaintiff renders USAG rendered discovery of Page 37 of the ASP Coordinator's Guide and Defendants' rendered Page 37 as discovery during administrative judicial process as further demonstration of Defendants' falsification of documentation. Plaintiff asserts Defendants' actions blatantly establish pretext.

Post-review of said manuals, Plaintiff met with Manager of Human Resources Mark McDonald regarding Defendants' failure to comply with governing rules and regulations. Plaintiff asserts Manager McDonald's prior knowledge of Plaintiff as one of the seventeen. Plaintiff asserts McDonald was unable to explain the discrepancies of Defendants' regulations and Plaintiff's non-selection advising Plaintiff he would meet with Manager of Labor Relations Diane Whitworth in attempt to discern Plaintiff's non-selection for ASP. Plaintiff attests Defendants' representative McDonald, after notification of having met with Whitworth, advised Plaintiff not to discuss this matter with anyone or continue pursuit of explanation which would "jeopardize postal career".

A25, Plaintiff recognized this as the direct threat to continued employment and placement as implied and is

evidenced as intended by Defendants' further actions with special emphases on Plaintiff's job placement.

B) DISABILITY CLAIM: (G) below applies)

B1. Plaintiff denies Defendants' allegations of additional breaks. Plaintiff asserts harassment by Defendants' representative precluded deviation from and performance of required activity and is evidenced herewith by sworn testimonies and Defendants' actions.

Plaintiff asserts this perjured pretext as rationale for Defendants' requisition of additional medical documentation was not rendered at administrative hearing. FURTHER, Plaintiff submits this altered pretext was not rendered until Defendants' unlawful request necessitated by hearing of this Court.

B2. Plaintiff asserts violation of rights under 29 CFR 1630.10 prohibiting the exclusion from jobs of disabled individuals, 29 CFR 1630.13(b) that are not essential functions of the job and 29 CFR 1630.14(c) as requirement was not job related.

B3. Plaintiff submits sworn testimony demonstrating violation by Defendants unlawful request for additional medical information while in the performance of her regular job duties. Sworn testimony of Plaintiff's performance of duty by Defendants' representatives and employees render requisition for further medical information prejudicial and unlawful.

B4. Jerome Barnes' sworn testimony acknowledges Plaintiff's performance of job duties with admission to Plaintiff's ability to perform with five(5) pound weight restriction 764:5-12-765:7. Plaintiff asserts maintenance of five(5) pound restriction at Defendants' pretext for work denial. Defendants' form requiring additional, unlawful medical information herein attached.

At 2003 deposition, Barnes was asked if he told his supervisor Plaintiff's arms were affixed to her body. Barnes' sworn testimonial reply was: " I don't recall, but I know I did. I'm quite sure I did,..."74:1-75:1, " I don't know for a fact, but

I'm quite sure I did."75:8.

B5. The following employees and co-workers of Plaintiff testified to the performance of job duties during the administrative hearing:

Octavia Reese testified to temporary assignment of Plaintiff's bid job with one hand and no lifting restrictions 821:18-822:2 demonstrating Plaintiff's job assignment as one allocated to injured employees due to its ease (Plaintiff's job description attached). Reese testified that Plaintiff worked her bid assignment 823:20-24.

Ricky Madden testified Plaintiff worked bid assignment 817:6-13.

Steve Oehler testified Plantiff worked bid assignment 837:16-20.

Christopher Lodes testified Plaintiff worked bid assignment 846:17-18.

Tajuana Sanders testified to accommodation made by affording Plaintiff a particular machine. Sanders testified to Plaintiff's performance of job requirements 429:3-12.

B6. Plaintiff asserts she worked her usual job assignments with the sole accommodation being release from the **un**enforced Air Record Processor requirement to rotate machines. Plaintiff contends no action was taken or behavior modified to justify Defendants' request for medical information and that said request was unlawful in violation of 29 CFRs 1630.15(a), 1630.13(b),1630 .10.,1630.2(m)(n) and related comparable laws requesting the completion of special medical information which was not a business necessity or job-related.

B7. Plaintiff contends the medical condition was resultant of an on-the-job injury of which Defendant's had access to the claim and appeal process. Further, the physician statement reflecting 'SAME' as Plaintiff's restrictions reflected on the continuous and on-going submissions relative to Plaintiff's left-hand on-the-job injury necessitated reference back to foundational documents. Plaintiff asserts that Defendants' did fail to behave managerially in assessment and investigation

pre-denial and their claim of lack of information readily accessible in their records or by request is pretext.

Plaintiff asserts Defendants' inherent responsibility to investigate pre-denial of work and compensation. Plaintiff alleges as illegal and Defendants' support their initiation of request for additional medical. Evidence supports this request occurred post-submission of Work Status report completed by Dr. Strong on the 25th August 1998. This status report states, "Cont. Same
restrictions". Plaintiff argues that Defendants' request for **clarification** required reviewal of previous Work Status submissions which reflect restrictions as "SAME" and/or specifically states the symbolic indication for 'left'. Plaintiff contends each of these Work Status forms were submitted to Defendants' and retained on the file cabinet of the Plaintiff's work site.

At 2003 deposition, Barnes' testimony acknowledges Plaintiff's records retained on-site in Defendants' "floor file". Barnes' renders testimony of uncertainty if he looked at Plaintiff's documentation 69:14-18in determination of work denial or lack of comprehension of restrictions 69:21-71:5. Plaintiff asserts Defendants' representative Barnes' presentation of three(3) distinct pretexts for denial of Plaintiff's reporting for duty. Plaintiff's required submission by and to Barnes' claimed inability to comprehend the term ***reach.*** Barnes' testimony at administrative hearing affixed Plaintiff's arms immobile to her body. Barnes' 2003 deposition stressed repetitive as rationale.

Plaintiff asserts Defendants' fabrication and perjured testimony and renders Defendants' required documentation which states "away from body" with no reference to 'arms' as supportive evidence of Defendants' pretext and knowledge of on-the-job ***arm*** injury as affected area.

B8. Plaintiff asserts Defendants' access mandated investigation before imposing any action against Plaintiff. Plaintiff asserts Defendants' internal Labor Representative Barnes' rendered deposition stating he would have to 'refer to

the prior status report to determine what same meant.'70:3-9. Barnes' acknowledged "same" expressing uncertainty of what the " L with a circle around it"70:21-23. (Plaintiff's B7 attached) on Plaintiff's work status reports while admitting receipt of similar symbols on medical documentation was indicative of left. Barnes' rendered sworn testimony that "if he didn't understand he would ask for clarification on it"99:1-101:19 further evidencing pretext of lack of understanding of 'L' by failure to inquire.

B9. Barnes' admits during sworn deposition to contacting Defendant's internal injury compensation division 94:13-95:13. This demonstrates Defendants' representatives knowledge of the availability of information regarding Plaintiff's injury in addition to those retained at the work site. Barnes' states during deposition he does not recall asking the nature of Plaintiff's injury 95:9-13, sworn admission that Plaintiff was performing regular job duties and issuance of discipline indicates actions imposed were not relative to Plaintiff's injury and Defendants' claim is rendered as pretense for these proceedings.

B10. Plaintiff demonstrates by Defendants' request for clarification of Dr. Strong's medical restrictions was focused on definition of the word 'reaching' and was supplied repeatedly by Dr. Strong's office and was the only request for clarification sought by Defendants'(attached herein). Plaintiff alleges Defendants' rationales vary and are altered demonstrate pretext.

Plaintiff asserts that Defendants' Labor representative Barnes' contact with Defendant's Injury Compensation office reasonably revealed the extent of said claim as limited to Plaintiff's left arm. Defendants were aware of this appointment and restrictions as on-the-job as demonstrated by Plaintiff's request for leave and the problems surrounding Barnes' postdated signature after occurrence.{ reference testimony of Anthony Brown included herein: Plaintiff's Use of Leave}; as pretext to issuance of discipline contrary to Defendants praxis, rules and regulations.

B11. FURTHER, the sworn testimony of Jerome Barnes' attests to his request for additional medical765:19. Barnes further testified that the information passed on to his superior was Plaintiff's inability to 'move her arms away from her body' 768:19-24.

B12. Patrick Clark testified Jerome Barnes told him Plaintiff was not to **"lift** her arms from the side of her body" 343:24-25. Clark's sworn testimony at administrative hearing to Plaintiff pro se stated agreement with Barnes' on the bases of Barnes' advisement 345:15-23 Plaintiff "could not **move** your arms from the side of your body" 344:10-12. Clark's sworn testimony was Plaintiff's work denial was due to Defendants' perception Plaintiff could not move her arms away from her body 344:13-17. Clark's explanation of Plaintiff's limitations were demonstrated at administrative hearing; as was identically demonstrated at hearing before Judge Vratil. Clark testified Plaintiff's enactment was Defendants' perception 346:14-347:1. In support of Plaintiff's enactment and Defendants' perception, Clark testified he questioned how Plaintiff could steer or drive a car incapable of moving hands away from body 347:12-348:1.

Plaintiff sets forth this testimony in support of her legal claim of disability as defined by law as satisfied by Defendants' sworn perception.

As Defendants' sworn testimony to Plaintiff's perceived condition would severely restrict their alleged presupposition falls under the auspices of disability. Legal attachment of disability does not mandate Plaintiff's actual disability and is not contingent on Plaintiff's state. Legal determination of disability classification based solely on Defendants' perception. Plaintiff meets the requirement of classification as disabled by Defendants' claimed perception Plaintiff 'could not move her arms away from her body'. Defendants' perception constitutes designation of Plaintiff as disabled as said perception evaluated Plaintiff's daily living as severely restricted.

Plaintiff re-asserts Defendants' requirement for additional medical information was unlawful and Defendant's sworn perception classifies Plaintiff as disabled and meets the legal requirement.

Plaintiff acknowledges Defendants' fluctuating claims to justify denial of work to Plaintiff as pretext. Defendants' knowledge and intentional pretext is evidenced by Defendants' requirement of Plaintiff to complete paperwork. Defendants' contend the issuance of discipline to Plaintiff as a result of Plaintiff's failure to rewrite documentation of submitted and utilized absence. A reasonable and prudent consideration of an individual incapable of moving their arms from their body would be assessment of inability or experience of great and undue difficulty attempting to write within restrictive boxes of a form. Plaintiff avers the re-submission of the form and ensuing discipline were improper and evidences Defendants' pretext for continuing, ongoing and blatant discrimination.

B13. Defendants' requirement of continued involvement telephonically in EEO activity , continued enforcement of EEO deadlines requiring and ordering the submission of and completion of paperwork, response to job re-alignment and Defendants' proposal and issuance of discipline for Plaintiff's refusal to rewrite notification of absence are evidence of the pretext of the bases for Defendants' work denial of Plaintiff. Plaintiff asserts constant contact with Defendants' through these methods and the physical retrieval of pay until exhausted demonstrated and necessitated Defendants' knowledge contrary to their claim.

Plaintiff asserts the oxymoron contended as Defendants' perception of inability to move arms while issuing discipline for failure of re-completion of a form which does not require Plaintiff's completion. Plaintiff asserts non-possession of duplicates of similar referenced forms during work-denial but states that none were signed or submitted for the months of work denial in the exhaustion of leave exemplifies signature nor completion by Plaintiff is required.

B14. FURTHER, Plaintiff re-submits to this Court the sworn testimony of Jerome Barnes' regarding submission and completion of paperwork attesting to knowledge of movement Plaintiff asserts this negates his contention of disability and demonstrates as pretext 774:1-4; 785:9-12;786:5-15 and states awareness of Plaintiff's "several" EEOs 785:14-22.

B15. Defendants' requirement of Plaintiff to file another EEO in reference to work denial during pre-hearing conferences necessitated the completion of paperwork and contact with Defendants' further negating Barnes' claim during the 2003 deposition of Plaintiff's disability as sufficiently restrictive to deter answering the phone and writing 89:6-93-17 and references to Defendants' claimed *perception.*

B16. Plaintiff re-submits Defendants' rationale as pretext is exemplified by their raising issue with Missouri Division of Employment. Representative of Missouri advised Plaintiff of Defendants' effort to deny based on Defendants' contention Plaintiff initiated leave of absence. Plaintiff asserts had Defendants' believed disability whether permanent or temporary would have been a viable issue to raise against unemployment compensation. Plaintiff asserts Defendants' did **not** believe as later contended and was pretext.

B17. Plaintiff submits the sworn testimony of American Postal Workers union representative Christopher Lodes that Plaintiff was not told she could not return to duty as he witnessed and inquired 843:10-21 as supported by union documentation. Plaintiff asserts Defendants' representative threat of force as irrational and unwarranted and each explanation rendered since as pretext.

Christopher Lodes' sworn testimony is Plaintiff inquired of allowance to return to duty and Lodes' inquiry of management afforded Plaintiff's return 843:22-845:20. Lodes testifies he was told Plaintiff could report for duty.

Plaintiff further asserts she was called by Defendants' timekeeper to report early for overtime that same date of threatened forcible removal and declined due to work hour

limitation.

B18. In support or the assertion of pretext, Plaintiff renders Defendants' procedural requirement mandating incapacitation as the only excuse for failure to report for duty. Plaintiff attaches herewith the sworn testimony of Union Stewards Ricky Madden 806-810:7 and Christopher Lodes 846:19-22. Plaintiff renders statement made on the record by postal attorney White regarding the requirement for incapacitation and seeking to place an employee so designated 857:4-9 evidencing Defendants' disallowance of Plaintiff's work and compensation requiring falsification of perception after the fact.

B19. HEREWITH, Plaintiff attaches Defendants' mandating and requirement of placement upon determination of Department of Labor approval for the complications with same condition and Plaintiff's request to leave. Plaintiff asserts reporting for duty and submission of typed necessary documents this date had caused sleep deprivation, pain and headache which aggravated by injury. Plaintiff requested the night off and was rendered this form and instructed to sit in the office with lights off and answer telephone with stipulations to refusal as cited on order. Plaintiff's request and order were for the one night eight hour shift as documented.

B20. Plaintiff renders to this Court that work-denial was wrongfully instigated by an unofficial form and was inappropriately handled in violation of Defendants' regulations. This is demonstrated by the samples supplied within Defendants' investigative file and those intentionally omitted. Plaintiff attaches Defendants' partial response to administrative process interrogatories wherein Defendants' representative notarized statement purports t the referenced form - B04/B4 herein attached as a general form generated by Defendants.

B21. PLAINTIFF contends Defendants' regulations regarding handling medical assessment governed by Its Personnel Operations Handbook EL-311 Chapter 3 Employment Suitability and Consideration. Plaintiff submits

citations 342.3 ,343.1,343.32 ,343.51 and 343.53, hereto attached. Plaintiff affirms no such pretext has been rendered to date and Defendants' did not implement, suggest, afforded or address evaluation by Its medical officer to aide in Defendants' inability to comprehend physician of Plaintiff. AND, that Plaintiff was permitted to return to duty without stipulations regarding movement or postal fitness for duty upon discovery of award of Missouri Unemployment overruling the issue Defendants' falsely raised and were unable to substantiate their pretext for denial. FURTHER, Plaintiff asserts Defendants' failed to implement fitness-for-duty action due to Defendants' true objective and required documentation could not support medical request.

B22. Defendants' rules dictated Plaintiff be afforded Fitness for Duty as stipulated by Defendants' regulations ELM 861.1, 861.2(g) and 864.2-865.51 and Plaintiff's request to return. Plaintiff asserts Defendants' failure to adhere to the governing regulations substantiate pretext. Any contention by Defendants' of Plaintiff's meeting weight requirements; which exceed Plaintiff's previous and samples of other employees attached; are without merit to movement of arms from the body. Plaintiff asserts that restrictions indicative of ***any*** weight limit demonstrated movement and was present within the illegal requirement of completed unofficial form.

B23. Plaintiff asserts Defendants' governing regulations precluded the arbitrary decision as attributed to Jerome Barnes' in imposing work denial or return to duty based on Defendants' claimed perception. Plaintiff maintains Defendants' requiring additional medical information was illegal and thereby every action pursuant from the same bear the fruit of said illegal request. Plaintiff maintains Defendants' governing regulations, disregard of incapacitation rules ELM 513.362,513.363,513.364, 513.365, 513.38 and requirements imposed on Plaintiff reflect the impropriety and pretext of Defendants' contention.

B24. Evidence supports Defendants' failure to adhere to cited regulations procedural requirements which govern

Defendants' management personnel determination of fitness for duty and was not adhered to. Plaintiff asserts the direct involvement of Manager of Labor Relations evident through presence at Plaintiff's plea to the administrative judiciary, requirement of another EEO complaint and investigation. Plaintiff's assertion of Labor Manager's knowledge preclude the error and improper handling being attributed solely to Jerome Barnes. Plaintiff had a reasonable expectation in the Labor Manager's awareness of the governing procedures. FURTHER, Barnes and Clark attributed Plaintiff's requests of job verification denials as in compliance with instructions of Labor Manager Whitworth.

B25. To date, no evidence has been rendered by Defendants' of submission of documentation per governing policy and regulations as outlined in the Employee Labor (ELM) or Personnel Operations manuals. Plaintiff asserts Defendants' work denial was autocratic, without foundation or justification and evidences continued and ongoing racial, discrimination and retaliatory animus toward Plaintiff.

B26. FURTHER, Plaintiff asserts that the period of work denial upon approval as a covered on-the-job injury by OWCP entitled Plaintiff to compensation and restoration of leave and monies. Defendants' became aware of Department of Labor's approval in 2001. Plaintiff's submission for compensation in accordance with governing laws as entitled has been continually refused and ignored by Defendants well beyond the scope of OWCP's deadline for the months Plaintiff was not permitted to report for duty due to Defendants' pretext as relative to Plaintiff's approved on-the-job injury. As of this date, 06 May 2004, Plaintiff has not be compensated for Defendants' pretext of work denial resultant of restrictions from the on-the-job injury.

B27. Logical reasoning and Defendants' governing rules evidenced by 513.38 supports Plaintiff's contention that Defendants' had a managerial duty to adhere to its procedural regulations of investigation including the requirement of fitness for duty examination by medical personnel **before**

denial of work to Plaintiff were Its rationale based on Plaintiff's physical condition.

AND, Plaintiff contends Defendants' failure to submit necessary documentation or require Plaintiff's examination are further evidence of pretext in Defendants' claimed rationales.

C) Customer Service Supervisor, Shawnee Mission

C1. Plaintiff asserts that submission of evaluation for the referenced vacancies was proper and in accordance with Defendants' governing rules and practices as evidenced hereinafter.

C2. Plaintiff asserts claims of racial and retaliatory discrimination in this Shawnee Mission selection process based on the temporal nexus and commonality of the composition of this boards' inclusion of Jean Moore.

C3. This assertion is evidenced by Defendants' Human Resource office's and all other board's cited herein determination of the impropriety of Plaintiff's exclusion. It is not controverted Defendants' Human Resource office determined the acceptability and viability of consideration of applications during the time of Plaintiff's application.

C4. Plaintiff submits copy of letter of explanation, evaluation without alteration of evaluation and application was acceptable to and met Defendants' governing regulations as demonstrated by their actions and evidence as exemplified herein. After Plaintiff's initiation of EEO activity, MDO Bruce Sanders' was no longer to handle per standard operational procedure. Scripted notes Bruce Sanders and Plaintiff regarding his refusal to complete per usual herein attached.

C5. Plaintiff alleges by supportive evidence Human Resources required full consideration of her application. Evidence is presented of Defendants' establishment of lists of acceptable and disqualified applications attached herewith. This is further evidenced by categorization of Plaintiff's application within Defendants' promotion reports, HR instructions to Board Members Omang, Moore and

Pennewell.

C6. Plaintiff asserts that all Defendants' Review Boards are governed by the same rules and required to render thorough consideration to applications supplied as approved by Defendants' Human Resource section.

C7. Plaintiff contends racial and retaliatory discrimination occurred against her application as a direct result of Jean Moore's presence on two of the three review boards due to her function as investigator of Plaintiff's previous EO activity.

C8. Plaintiff alleges evidence supports the disparity of handling represented by the two boards which Jean Moore was a member versus the one she did not. AND, constitutes pretext to the rationales rendered by Defendants and their representatives in contradiction to Defendants' procedural requirements and regulations.

C9. Plaintiff maintains as submitted in Response that Jean Moore's contradictions are incoherent due to the numerous variations in sworn testimonies, affidavits as efforts of justification, inconsistent in content.

C10. Plaintiff asserts Defendants' representative Moore's last alteration of rendered pretext exclusion of Plaintiff for the boards upon which Moore sat invalidate all claims of untimeliness of Plaintiff's evaluation by Sanders and acknowledges the acceptability of such submission(s).

C11. Board Members for the Shawnee Mission vacancy included Charles Pennewell, Jeffrey Omang and *Jean Moore.*

C12. Defendants' can not offer supportive evidence of requirement of time frame for dates of evaluation. Further, Defendants' governing guidelines of evaluation and assessment are common, consistent and identical by established Candidate Evaluation Board(CEB) guidelines for ALL such boards and it's members.

C13 Plaintiff renders the nearly identical affidavits of Moore, Pennewell and Omang attesting to the Board's illegal assumption of authority vested in Human Resources in elimination of Plaintiff from further consideration in

contradiction to governing CEB guidelines.

C14. Defendants' EEO comparative summary demonstrates Moore, Pennewell and Omang's contention that Plaintiff's evaluation was "eliminated from further consideration" based on their improper assessment of 'current' evidence rendering this testimony to Defendants' internal EEO investigator.

C15. Jean Moore's sworn testimony during the administrative hearing the rules governing Boards is supplied 203:5-20. Moore acknowledges understanding of Board requirement to consider all applications received by Personnel 210:2-6. Moore stated Plaintiff's evaluation was not considered and rated by Olathe Board members 215:19-21. Moore testifies moments later that Plaintiff's evaluation was rated 217:14-218:9. In July 2000 administrative hearings, Moore testified to her inability to recall much information relative to the Shawnee Mission and Olathe boards functioning 219:14-220:5. Moore's testimony in support of Plaintiff's elimination due to application date demonstrates her personal assessment and is not governed by Defendants' regulations which board members are required to adhere to and to which Moore's sworn testimony evidences Moore did not. In response to Plaintiff and the judiciary's request for explanation of establishing dates, Moore's personal assessment is attested to by her response "probably" 222:10-223:4. Moore's personal evaluation is restated in response to Defendants' representative's inquiry of that "current meant to you" 225:20-24. This testimony was rendered 06 July 2000.

C16. Defendants' representative Moore was re-summoned by Defendants on 07 July 2000 in effort to salvage Its pretext for exclusion of Plaintiff from Moore's contradictory, incoherent statements of the previous date. Moore purports recall on 07 July of thorough review of Plaintiff's application. Moore restated improper evaluation of Plaintiff's application based on her personal opinion and definition of 'current'.999:20-1000:17.

C17. Moore's statements are inconsistent with the governing CEB guidelines supplied through USAG discovery

which require relevance to job as "inside or outside of the Postal Service". This criteria does not; and by inference to lengthy postal employment; limit the time frame of information.

FURTHER, the CEB guidelines do not empower Boards to establish or determine candidacy acceptability of applications by imposition of rules outside the scope of defined guidelines. Governing and regulatory CEB guidelines dictate Defendant's retention of the Boards final rating sheet 1b-0099(ASP) and Personnel Operations Manual 538.33. Plaintiff asserts Moore's failure to rate Plaintiff demonstrated elimination from consideration and documentation was thereby not retained for EEO investigative or further discovery as evidence of Plaintiff's case.

Plaintiff submits Defendants' Personnel Operations handbook rules 525.232 and 538.32 mandated retention through exhaustion of Plaintiff's complaint.

C18. Plaintiff renders supportive sworn testimony of Defendants' Human Resource Specialist Denise Brownlee of Defendants' requirement and practice of package retention for two years 752:10-23.

C19. Plaintiff asserts Defendants' failure of adherence to these governing regulations of retention evidence support of and involvement in Moore's discriminatory practice against Plaintiff through expungement of and failure to produce incriminating evidence.

C20. Plaintiff submits specific excerpts from Defendants's Personnel Operations Manual in exemplification of governing rules and procedures for initial level supervisor position selection. These citations are applicable to all of Defendants' hiring practices and regulations as applicable to initial level supervisory positions as are the matters; Shawnee Mission, Olathe and ASP; before this Court.

*The referenced manual citation 531.3 demonstrate the responsibility and authority of Defendants' Human Resource section in determination of application acceptability demonstrating Moore's personal evaluation of current

referencing Defendant as improper and pretextual.
*The manual citation of 531.6 demonstrates and invalidates further references to dates by inference that selection can be and is recommended from pre-established lists of two year eligibility period 533.44, 533.45.
*The manual citation 532.531 which establishes 'application validity for two years' is further evidence of Moore's independent determination to render Plaintiff's application untimely was based on racist, discriminatory and retaliatory factors.
*Manual citation 533.31 demonstrates Defendants' requirement of applicants to ensure submission of applications. Defendants' actual praxis differs from 533.32 in making applicants responsible for ensuring inclusion of evaluation upon submission to Human Resources.
*Defendants' Personnel Operations manual citation 525.32 Methods of Ranking governs Defendants' initial level hiring process.
*Defendant's Operation's manual citation 533.5 Advisory Panel is testified by Manager of Human Resources as synonymous of all Defendant's hiring boards as titles interchangeable.
C21. Plaintiff asserts Defendants' standard operational procedure to ensure timeliness of applications and evaluations required applicants direct delivery to Personnel. This procedure as Defendants' common practice evidenced by electronic transmission from Human Resource Manager Smykowski herein attached and the acceptance by the deciding Human Resource authority acceptance and inclusion of Plaintiff's application as submitted. FURTHER, Plaintiff asserts Alberti's ASP evaluation discovery of EEO information inclusion and re-write and requests to Bruce Sanders evidence applicants' delivery normative.
C22. Charles Pennewell failed to appear at the administrative hearing. Presiding judiciary comments anticipating Pennewell's eventual appearance and conflict between Pennewell's letter and affidavit were stated in the

record. 925:7-926:30. It is Pennewell's sworn deposition statement he was never advised to testify at the administrative hearing 12:8-21.

Pennewell's sworn testimony thereby is limited to affidavit rendered 06 February 1998 and deposition taken 05 November 2003.

C23. Pennewell's sworn affidavit; herein attached; contends the board "first reviewed all 991s to determine if they were complete and current, current being evaluations that were signed by a manager in a reasonable period of time from the vacancy announcement. Individuals who submitted 991s were not current or incomplete were eliminated from further consideration for the vacant positions." Pennewell states, " Those 991s that were not complete and current were not considered further for the vacant positions."

C24. Plaintiff asserts Pennewells' inference; without regard to their impropriety and in contradiction to governing rules; is that Plaintiff's application was not rated and eliminated from consideration at cursory review.

C25. In 2003, rendering sworn deposition Pennewell affirms the affidavit and its statements 16:5-19:15. Pennewell attests to having no knowledge of instructions, literature or regulations indicative of this Board's imposition against Plaintiff. Further, he negates his authority for said decision by admission that he does not work in personnel 26:23-27:4.

Pennewell testifies to Human Resources authority in determination which applications are disqualified noting the disqualification of Mr. Meyn for non-submission of a current evaluation in contradiction of this board's application of the term 29:2-31:9 Pennewell further admits determination of Plaintiff's application as qualified for consideration and further attests to Human Resources authority by the need to; though not testifying this procedure was followed; call and inquire31:20-34:8. Pennewell testified Plaintiff's application was eliminated from consideration by this board, 36:14 contrary to Defendants' governing regulations and procedures.

Pennewell attests the matrices were turned into Human Resources per procedure 38:22-39:4 and in support of Plaintiff's charges of Defendants' failure to produce documents requiring retention and in lieu of this process is resultant from the evidence of pretext inherent in said documents.

C26. Pennewell continues to attest to the lack of legitimate reasons for its action in the Board's elimination of Plaintiff's application 41:9-44:13. In contradiction to Moore's depositional
testimony; which was in contradiction to Moore's previous testimony and affidavit; Pennewell testified the board did not rate Plaintiff as eliminated from consideration 46:5-47:21 and supports Plaintiff's complaint regarding Defendants' failure to produce matrices 47:4-21, 52: 15-19. Pennewell testifies to the Defendants' promotion report; attached herewith. Pennewell maintains under oath Plaintiff was application deemed ineligible but is not reflective by entries on the promotion report 48:15-50:5.

C27. Plaintiff asserts the promotion report categorizes her as "not interviewed, not selected" due to the impropriety of Board's elimination from consideration in violation of Defendants' rules and regulations and that improper elimination was dictated by and a result of Jean Moore's knowledge of Plaintiff's race and previous EEO activity.

C28. Pennewell testifies to Defendants' regulation requirement of ineligible applications be returned to personnel maintaining Plaintiff's application was not evaluated or included within required matrices 51:4-52:19(see Williams C26). Pennewell testifies regarding his signing and sending a letter to Plaintiff indicating her "qualifications were thoroughly considered" and its inaccuracy as the Board had deemed Plaintiff's application as ineligible and failed to advise personnel and Plaintiff of said designation 54:8-55:25.

C29. The third Shawnee Mission Board member was Jeffrey Omang. Omang's affidavit; attached herewith; is a near verbatim recount of Moore's and Pennewell's for this matter.

Plaintiff makes note of the oddity and implausibility of the similarities being the verbatim, personally rendered testimony of three individuals. It was the testimony of Jeffrey Omang he did not meet with fellow board members or receive instructions in the completion of his affidavit but professes to having completed the affidavit 46:20-47:4.

Jeffrey Omang testified at administrative hearings on 06 July 2000 and was re-summoned on 11 July 2000 by Defendants. Plaintiff's contentions referencing Defendants' efforts to consolidate the variations of Moore's testimonies are equally applicable to Omang's.

Omang testified Plaintiff's application was designated untimely during the review process 47:12-23. He acknowledges Defendants' procedural requirements in the event of elimination and/or non-consideration of an application by stating that a letter should have been sent to Plaintiff 47:22-48:3. Omang testifies that a board member is not to evaluate applicants upon which boards they sit 48:4-17. Plaintiff reasserts the complaint regarding Defendants' falsification of documentation. Omang testifies to instructions and guidelines supplied by Defendants personnel office to which the board is to adhere 48:18-25. Omang testifies, "If she" - referring to Plaintiff - " had been disqualified, why would we consider her--" and states Plaintiff application was considered 61:1-21 and testifies to no recollection if Plaintiff's application was evaluated 84:3-24. Omang testifies to non-consensus of the term current among the board members; without regard to the impropriety of and its violation of Defendants' governing regulations; in defining the term 'current' 62:21-24, 83:7-8. The impropriety of the board's pretext for elimination of Plaintiff's application is exhibited by Omang's testimony and inability to provide guidelines for determination of timeliness 63:6-64:12. Plaintiff asserts Omang's inability is based on such determination being beyond the purview and scope of any Defendants' boards as stated within governing regulations and procedures.

C30. Post-presentation of Pennewell's letter to Plaintiff, Omang testifies Plaintiff's application was considered 79:3-4. Omang testifies to the evaluation by an MDO for a clerk acting as 204-B comparable to Plaintiff's submission - as being the "most current" 79:14-80:2.

C31. Re-summoned by Defendants' attorney 11 July 2000 in continuance of administrative hearing, Jeffrey Omang altered his sworn testimony stating Plaintiff's application was considered. Said alteration duly noted by hearing judiciary 934:3-935-4. Omang'a altered testimony statesPlaintiff's application was thoroughly reviewed 936:19-21, 940:1-10 in contradiction of earlier testimony 47:12-23, no recollection 84:3-24 and tendered affidavit. Omang alters previously sworn definition of current from six months 62:21-24, 83:7-8 to two to three months 938:11-14. Omang testified the dates on Plaintiff's evaluation did not affect the numeric score 941:10-15

Plaintiff asserts acceptance of application by the deciding official, governing regulations dictating board consistent adherence to Human Resource instructions precluded elimination. Plaintiff asserts this board's assessment as 'current' was errant, beyond its authority and pretext to the composition of the board's inclusion of Jean Moore as previous EEO investigator with knowledge of Plaintiff and past EEO activity.

C32. Plaintiff submits copies of Defendants' internal electronic transmissions exemplifying Moore's familiarity with Plaintiff. FURTHER, Plaintiff asserts Moore's failure to follow through on previous EEO activity was a determining factor in its resolution and as such decreases the likelihood of Moore's inability to recall. AND submits electronic transmissions of Plaintiff and Moore exhibiting familiarity.

FURTHER, Plaintiff asserts **all** Defendants' selection boards are governed by identical rules and regulations. This contention is supported by the testimony of Kim Smykowski during the administrative hearing. Kim Smykowski was summoned as expert witness in her capacity as Defendants'

manager of personnel, as an expert in Human Resources and was qualified as an expert witness 986-995:20.

Defendants' Human Resource Manager Smykowski testified to the assignment of Human Resources' responsibilities as relative to these matters as determining authority of elimination of applications. Smykowski testified citation 534 governed the position(s) at issue992:20-21 in conjunction with citation 535 from Defendants' personnel operations manual 993:20-994:5. (Citations attached herewith). Smykowski testified to the interchangeable references to Defendants' boards as advisory panels, review boards and selection committees 994:17-995:16. Defendants' Human Resource Manager Smykowski's expert testimony is attached herewith 983-998 for the Court's review.

D) Customer Service Supervisor, Olathe

D1. Board Members for the Olathe vacancy included *Jean Moore,* Sarah Wilson and E. Keith Coleman. Sarah Wilson chaired this board.

Defendants' EEO investigative affidavits; herein attached; of board members Wilson, Coleman and Moore support Plaintiff's assertion of Moore's discriminatory practice led to exclusion. The temporal nexus of said racial and retaliatory discrimination is the presence of Jean Moore in the composition of Defendants' Olathe and Shawnee Mission boards.

D2. Defendants' governing candidate evaluation board regulations require consensus of **ALL** board members. Evident by the board members' affidavits and testimonies, this board did not reach consensual agreement to disqualify Plaintiff from consideration. FURTHER, the evidence supports Jean Moore alone and improperly disqualified Plaintiff's application due to Plaintiff's race and previous EEO activity.

D3. Board Chairperson Wilson's affidavit demonstrates her compliance with Defendants' governing regulations. Wilson's affidavit demonstrates Plaintiff's application was **not**

disqualified or eliminated from consideration on any bases by this board. Wilson and Coleman's sworn affidavits and testimonies evidence Defendants' knowledge and support of and pretext presented by Jean Moore.

D4. Chairperson Wilson rendered sworn testimony at the administrative hearings in support of previously sworn affidavit. Chairperson Wilson testified to the functioning of the Olathe board
detailing Defendants' CEB procedural requirements138:22-140. It is Wilson's testimony that the board rated all applicants 142:1-7.

The administrative judge states for the record his understanding disqualification as a personnel function and not individually determined or enforced by board members 142:16-143:4.

Wilson testifies that determination of consideration of applications are determined by Defendants' personnel office 144:21-145:13. Wilson's testifies that evaluations on applications are relative to the supervisor who supervised the performance of the task presented 149:15-18.
Wilson exemplified understanding of the requirements in her testimony 150:3-8, 152:23-25. Wilson as Chairperson of the Olathe board testifies to no distinction in consideration of Plaintiff's application 153:15-154:19.

D5. Board Member E. Keith Coleman testified at the administrative hearing and by affidavit. Coleman's sworn affidavit testifies to use of Defendants' CEB guidelines which by infers he evaluated Plaintiff's application comparable to all others considered. FURTHER, this assertion directly opposes Moore's contention and is demonstrative of her pretext presented in elimination of Plaintiff's application and its actual basis being Plaintiff's race and previous EEO activity.

Board Member Coleman sworn testified at administrative hearing to Defendants' governing selection methods 174:10-175:1. Coleman's testimony described said governing regulations and rules as "all the same" 175:17-177:21. Coleman testimony attests to the board's use of required

matrix 178:10-14. Coleman's testifies of having no recollection of any problem with Plaintiff's application 179:8-20. Coleman testified applicants were selected based on their total score 183:14-15 as compiled by the board. Coleman's testimony asserted consolidation was done verbally and the board members had no knowledge of how the other members rated the applications for the referenced Olathe vacancy185:10-22.

D6. Plaintiff alleges the method of verbal consolidation testified by Coleman of the Olathe and testimony of Board chairperson Wilson evidences scoring of Plaintiff's application was prejudiced by Jean Moore's failure to rate. Moore's rationale for exclusion is evidenced as pretext by her failure to apprise fellow board members and seek required board consensus.

D7. Plaintiff asserts the claim of discrimination in these applications is based on the temporal nexus and commonality of the composition of this boards inclusion of Jean Moore. Evidence is rendered by Defendants' determination of the impropriety of Plaintiff's exclusion.

Evidence and sworn testimonies support Defendants' Human Resource office determined the acceptability and viability of consideration of applications.

D8. Plaintiff asserts information and testimony of Jean Moore represented above. under C) Shawnee Mission and applies to this matter. However, in the interest of a modicum of brevity, Plaintiff seeks the Court's application of Jean Moore's information to and relative of both Shawnee Mission and Olathe and granting Plaintiff and hearers relief from inserted repetition.

D9. Plaintiff notifies the Court, Moore's pretext the only duplication between these two boards evidencing Plaintiff's legal bases of the temporal nexus of Jean Moore's presence.

D10. Evidence, sworn affidavits and testimonies support the fact Defendants' Human Resource Office determiner of the acceptability and viability of applications by submission to review boards for evaluation.

Further evidence that Defendants' representative Moore's action in determination of Plaintiff's exclusion from consideration n improper assessment of 'current' is supported by consideration of board members Sarah Wilson, E. Keith Coleman, Donald Martin, Shirley Williams, Lillian Jackson, Manager Smykowski's sworn affidavits, sworn testimonies and rendered evidence support Defendants' governing rules and regulations were identical for all three boards.

FURTHER, Plaintiff advises the Court that application for the three vacancies were **identical** wherein Plaintiff's only alteration was in boxes indicating the position applied and its numeric identification. Plaintiff advises the Court of attachment of identical letters with the copy of Plaintiff's evaluation as completed by Bruce Sanders altering only the numerical and title location of positions applied for and thereby contends Plaintiff's legal bases are supported by the evidence.

Plaintiff asserts Defendants' pretext by perjured, contradictory testimonies of Moore and Omang; noting herein Moore's failure to sign 2003 deposition; 2003 deposition of Pennewell advising of Plaintiff's elimination, letters to Plaintiff from chairpersons of Olathe and Shawnee Mission boards, Defendants' citation of Plaintiff's application process within both promotion reports and the Defendants' national governing regulations evidences Defendants' intentionality for commission of discriminatory and illegal activity against Plaintiff.

D11. Plaintiff asserts the attached Olathe promotion report categorizes her as "not interviewed, not selected" does not signify Defendants' applicable code zero "not eligible" as for Paul Meyn - a disqualified applicant. Plaintiff asserts the impropriety of Moore's disqualification in violation of Defendants' rules and regulations and that improper elimination was dictated by and a result of Jean Moore's knowledge of Plaintiff's race, previous EEO activity and discriminatory.

Plaintiff asserts Sarah Wilson's testimony and affidavit

Jackson testified that anyone serving on Defendants' boards undergoes required training to ensure consistency in use of Defendants' principles in completion of matrices 99:19-100:6. It was Jackson's testimony completion of Defendants' requirement by matrix is required for review committees 100:23-100:1 and testifies to having served on several boards 101:12-13; 102:9-18. Jackson testified Defendant's personnel - aka Human Resources - supplies instructions and guidelines for every; of the several; boards she had sat on 103:2-10. Jackson's testimony explained the numeric rating system utilized by the Kansas board which yielded Plaintiff's total score as fifty-nine(59) with a total average score of 2.2. Jackson testified the next highest score was sixty-three(63). Jackson contests the validity of Defendants' records implying what she had written had been altered. 111:13-117:4. This board chairperson having sat on several boards testified to no relevance to the dates on Plaintiff's evaluation and has no recall that the dates of Plaintiff's evaluation were at issue 121:11-122:12. By inference, Jackson testifies that evaluations by an immediate supervisor are not required when stating the evaluating "supervisor may be retired or gone" 125:11-12 and 128:20. Plaintiff asserts Bruce Sanders remained employed by Defendants' during the boards for Plaintiff's applications to Kansas City, Olathe and Shawnee Mission. Jackson testified that evaluation dates are not a requirement 134:17-135:13.

E4. Kansas Board member Donald Martin's sworn affidavit testifies Plaintiff's numeric score was 59 and only applicants scoring over 60 were considered for interview. He references a point
system for each requirement. At the administrative hearing, Martin testified to having sat on approximately thirty(30) boards finding the initial levels responsibilities the same 189:25-190:13. Martin's unsolicited testimony regarding timeliness stated cursory review of applications included consideration of Plaintiff's 191:25-11

E5. Kansas Board member Shirley Williams' affidavit

supports Human Resource directives and letter rendered to Plaintiff; both attached herein; and asserts the results represent Jean Moore's failure to adhere to Defendants' governing directives.

E. PLAINTIFF'S SUBMISSION OF IDENTICAL APPLICATION to KANSAS BOARD :

E1. Plaintiff renders for the Court's consideration sworn affidavits and testimony of Defendants' board convened for the filling of its Supervisor, Customer Services in Kansas City, Kansas in support of Plaintiff's legal bases of the temporal nexus of Jean Moore's presence on the Olathe and Shawnee Mission boards. FURTHER, this is rendered as evidence of pretext purported by Jean Moore in elimination of Plaintiff's application for the Shawnee Mission and Olathe positions from consideration noting Kansas' two point scoring difference of Plaintiff from interviewed applicants. Plaintiff asserts qualification for Olathe and Shawnee Mission had Jean Moore's discriminatory practices not influenced the boards' scoring.

Plaintiff restates the documentation for this position as applies to Shawnee Mission and Olathe were identical excluding references to the specific position applied for. Each application contained Plaintiff's letter and the evaluation completed by Bruce Sanders.

E2. The Kansas City, Kansas board was comprised of Lillian Jackson, Donald Martin and Shirley Williams. Lillian Jackson was this board's chairperson.

Chairperson Jackson's sworn affidavit, herewith attached, attests to the Kansas board's adherence to Defendants' governing regulations and procedures. She testifies that each board member completed a hard-copy matrix to her for consolidation. Jackson's affidavit indicates Plaintiff's consolidated rating fell two(2) points below the seven considered for interview and infers Plaintiff's exclusion from delivery and retail led to the two point difference.

E3. Chairperson Jackson's sworn testimony at administrative hearings in support of her tendered affidavit.

attests to following Defendants' governing regulations. Williams sworn testimony at administrative hearing to "it being somewhat irrelevant what date it was" in explanation to applicants response to requirements as "important because you have done it" 240:4-20. Williams' response to the postal attorney's effort to place value on dates of applications testifies to extenuating circumstances 243:16-244:1. Williams' testimony discussed Plaintiff's lack of delivery background 248:2-9. Defendants' attorney inquired of Williams if this board encountered problems with an applicant not having a current evaluation. Williams testimony indicated this board did not encounter that problem 260:2-10.

E6. Plaintiff contends these sworn statements demonstrate Defendants' governing procedures for consideration and selection of applicants. EEO comparative analyses, sworn testimonies and affidavits of Coleman, Williams, Martin, Jackson and Wilson; attached herein; demonstrate the pretext presented by Moore, Moore, Pennewell and Omang regarding Plaintiff's application.

WHEREAS, Plaintiff renders to this Court the consolidated matrix supplied by Defendants' of the Kansas City, Kansas position which supplied individual matrices in support of the same. This evidence supports Plaintiff's assertions of Defendants' governing regulations of retention. Plaintiff alleges Defendants' pretext in failure to retain required documentation due to incriminating evidence contained therein of Jean Moore's failure to rate Plaintiff's application for Olathe and Shawnee Mission positions on the bases of Moore's knowledge of Plaintiff and previous EEO activity.

F) AIR RECORDS PROCESSOR and CLERK STENOGRAPHER POSITIONS

F1. Plaintiff asserts Defendants bears managerial responsibility in determination of Plaintiff's employment assignment. Defendants purposely with malice aforethought failed to properly assign or notify of any assignment contrary to Defendants governing regulations resultant of Plaintiff's

race and previous EEO activity and all rationales presented are pretext. Plaintiff asserts evidence regarding this issue supports allegation of Defendants' pretext and is attached herewith.

F2. Plaintiff asserts Defendants' failure to assign upon abolishment of the LSM as racial, retaliatory discrimination. Defendants' policy and contractual provision required Plaintiff's assignment be automatic. Instead Plaintiff had to make numerous appeals and requests for temporary job assignment. Defendants' failure to adhere to their governing rules now render pretext as rational for their treatment of Plaintiff. This is evidenced by Defendants' investigative file rendering of contractual provision Section 4A dictating Plaintiff's assignment be within "seven days" of the termination of MPLSM. Defendants failed to assign Plaintiff is evidenced by the affidavit of Mary Kay Elias as rendered in Defendants' EEO investigative file. Elias' sworn statement renders Plaintiff was not issued due assignment on 17 July 1997 until 05 August 1997.

F3. Plaintiff asserts Defendants' awareness of testing for Air Records Processor position
successfully. Defendants' failure to render test scores while withholding Plaintiff's job assignment is contrary to its governing rules and procedures. Every rationale rendered by Defendants' is pretext to the real and malicious intent of said failure.

Plaintiff asserts the logic of Defendants' duty and responsibility of proper placement and assignment as demonstrated by governing policies, procedures. and evidenced. Governing citations include but are not limited to Defendants' governing ELM 354(.11, .221, .223) which dictated accordance with the National Agreement, managements' responsibility to discuss Plaintiff's assignment and Defendants' responsibility to ensure Plaintiff provided with assignment. As referenced in accordance with American Postal Workers' Union National Agreement, contractual

TO CONTINUE: PLEASE REFER TO COURT RECORD

CITATIONS

A adverse employment action includes acts that "constitute[] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision [of] significant change in benefits.'Sanchez v. Denver Pub. Schs. 164 F.3d 532(10th Cir., 1998)

Allen v. Muskogee, Okla. 119 F.3d 837,839(10th Cir. 1997) A disputed fact is material if it might affect the outcome of the suit under the governing law and the dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Borowski 63 F. 3d at 138.

"Defendant employer is obligated to demonstrate it (has) complied with the various statutory duties placed upon it most esp. the duty to provide reasonable accommodation."

the existence of a plausible accommodation.

Buckingham v. U.S. 998 F. 2d 735,741-42 (9th Cir.).

employer's duties under the Rehabilitation Act: *Section 501 and duty to reassign under 1992 amendments are mandates with which federal employers are obligated to comply.* 10th Circuit citing 9th Circuit's interpretation.

Copelin-Brown v. New Mexico State Pers. Office 04-2099 (10th Cir. *03/02/05) as employment denial "can only be for specific reasons, his or her expectation of continued employment is sufficient to invoke the protections of the Fourteenth Amendment"* citing *West v. Grand County 967 F.2d 362,366 (10th Cir. 1992).*

Doebele v. Sprint/United Mgmt. Co. 342 F. 3d 1117, 1130 (10th Cir. 2003): a covered entity mistakenly attributes such incapacitation would substantially limit major life activities and is not precluded from the Acts when the covered entity entertain misperceptions about the individual that one does not have. ibid AND that *"An individual rejected from a job because of myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability... whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. (citing 29 C.F.R. pt. 1630, App. 1630.2(l).*

AND
[ALL] Both statutes expressly prohibit retaliation against individuals who makes charges under or otherwise exercise rights granted by their provisions. *See* 42 U.S.C. § 12203(ADA); 29 U.S.C. §2615 (FMLA).
EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184,1193 (10th Cir. 2000). *At the prima facie stage , the plaintiff's burden is "not onerous."*
EEOC Management Directive(MD-715). Title VII EEOC Compliance Manual Section 8 : prohibits statutory retaliation defined as any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party from engaging in protected activity. Protection applicable for "individual charging employment discrimination under the statutes enforced by EEOC in EEOC proceedings, state administrative court or court proceedings as well as in federal proceedings."..... provisions prohibits in its central purpose that adverse actions of unfounded civil charges that are likely to deter reasonable people from pursuing of their rights of protected activity and undermines the effectiveness of the EEO statutes and conflict with the language and purpose of anti-retaliation provisions which is to maintain unfettered to statutory remedial mechanisms, harms public interest by deterring others from filing a charge(s).
Faretta v. California, 42 U.S.806(1975): 'Federal court pro se protected since the nation's beginnings. Section 35 of the Judiciary Act of 1789, 1 Stat 73, 92 enacted by first Congress and signed by President Washington.' This act 'guarantees in federal courts the right of all parties to plead and manage their own cases personally or by the assistance of counsel. Cited by this Supreme Court: *Schwartz, The Bill of Rights: A Documentary History(1971):* That in all courts all persons of all persuasions may freely appear in their own way and according to their own manner and there (422 U.S. 806,829) personally plead their own cause themselves or if unable by their friends..."Currently codified 28 U.S.C. 1654, The U.S. Supreme Court indicates 'majority and ruling view' this right supported by the U.S. Constitution. The Bill of Rights protect self-representation. Colonial Charters established the right to counsel means the right to

choose between pleading through counsel or representing oneself. Founders believed self-representation was a basic right of a free people developed from natural law.

Federal Rules of Civil Procedure 8 - (EMP.(e)(1)) [T]echnical forms of pleading are not required. *Id.§ 1202, at 68. 5 Federal Practice and Procedure § 1182, at 13.* Rule 8 is "designed to discourage battles over mere form of statements and to sweep away the needless controversies which the [predecessor] codes permitted", so that all parties can proceed directly and more efficiently to resolving cases on their merits. Id. §1201 at 67 n.11 "Under the Rules... a case consists **not in the pleadings but the evidence;** (emp. added); for which pleadings furnish the bases. Cases are generally to be tried on the proofs rather than the pleadings.

Fed. R. Civ. P. Rule 56c: pleadings, depositions, answers to interrogatories and admissions on file together evidence genuine issues of material fact (affords) entitlement to judgement as a matter of law.

Fed. R. Civ. Proc. 56c) " *the pleadings, depositions, answers to interrogatories and admissions on file together evidence genuine issues of material fact and thereby Appellant is entitled to judgment as a matter of law.*

Green v. State of New Mexico, 04-2160 (10th Cir. 08/31/05):

(1) with evidence that the defendant's stated reason for the adverse action[s] was false

(2) with evidence that the defendant acted contrary to company policy prescribing the action to be taken by defendant under these *circumstances and*

(3) defendant acted contrary to unwritten policy or contrary to company practice when making the adverse employment decision (WRIT, Pages 19-20)

Haines v. Kerner 404 U.S. 519(1972): *"a pro se complaint, however inartfully pleaded must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."*

Kelley v. Metallics West , 04-1051(10th Cir.) :

An employer who is unable or unwilling to shed his or her

stereotypic assumptions based on a faulty or prejudiced perception of an employee's abilities must be prepared to accommodate the artificial limits created by his or her own faulty perceptions.

AND

...reasonable accommodation makes no distinction between employees who are actually disabled and those who are merely regarded as disabled.

AND

"*We conclude that an employer must reasonably accommodate employees regarded or perceived as disabled.*" (emphasis added).

AND

Citing the 3rd Circuit therein: "*As the 3rd Circuit expressed it, the real danger is not that an employee will fail to educate an employee concerning her abilities, but that "[t]he employee's limitations are perceived accurately gets to work, while [the employee regarded as disabled] is sent home unpaid.*" Williams, 380 F3d at 775 Kendrick v. Penske Trans. Servs., Inc. 220 F.3d 1220,1230(10th Cir. 2000): typically shown in three ways: (1) with evidence that the defendant's stated reason for the adverse action was false; (2) with evidence that the defendant acted contrary to company policy prescribing the action to be taken by defendants under such circumstances; or (3) with evidence that the defendant acted contrary to unwritten policy or contrary to company practice when making the adverse employment decision affecting the plaintiff.

Miller v. Eby Realty, 03-3307,04-3076 (10th Cir. 01/26/05), defined the existence of pretext:

"*when an employer does not honestly represent its reasons for terminating an employee (source citation omitted). (pretext is defined as (1) "An ostensible or proffered purpose; an excuse" and (2) "An effort or strategy intended to conceal something").*

Concluding:

"*it is permissible for the [factfinder] to infer the ultimate fact of discrimination from the falsity of the employer's explanation*" Reeves, 530 U.S. at 147 *and that such inference is consistent with the general principle of evidence law that the factfinder can consider the dishonesty about material fact as affirmative evidence of guilt.*

Orr v. City of Albuquerque, 03-2287 (10th Cir. 2005) *obligated use of sick leave which it severely diminished and was prevented from accruing additional amounts significantly altering reserves for future illnesses or early retirement* and demonstrates adverse employment action

Orr v. City of Albuquerque, 03-2287 (10th Cir. 2005) :

"non-discriminatory reasons advanced by an employer to dispel the inference of discrimination raised by an employee at the prima facie stage, it can not...defeat an employee at the prima facie stage".

Orr v. City of Albuquerque, 03-2287 (10th 2005),:

"at the prima facie stage of the McDonnell Douglass analysis, a plaintiff is only required to raise an inference of discrimination not dispel the non-discriminatory reasons subsequently proffered by defendant

Salehpoor v. Shahinpoor, 358 F.3d 782,789(10th Cir.) Unsupported conclusory allegations *(or claims)*, however do not create an issue of fact. *(as relative to Defendants' pretext)*

Simms v. Okla. ex rel. Dep't of Mental Health and Substance Abuse Servs. 165 F.3d 1321, 1326(10th Cir. 1999): Summary judgment is *'only'* appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.

Southwestern Comm. College v. Davis 442 U.S. 397,410 (1979). *Federal employers are charged with greater duty than federal grantees or private employers. For federal employees, therefore non-discrimination requires more than mere equal treatment of disabled employees and job applicant and encompasses affirmative duty to meet the needs of the disabled workers and to broaden employee opportunity.*

Swierkiewicz v. Sorema, N.A. 534 U.S. 506(2002).: "An employment discrimination complaint need not contain specific facts establishing a prima facie case under the McDonnell-Douglass framework, but instead must contain only a "short and plain statement of the claims showing that the pleader is entitled to relief," *Fed. R. Civ. Proc. 8(a)(2). McDonnell Douglass Corp. v. Green, 411 U.S. 792(1973):* "requires the plaintiff show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment

action, and (4) circumstances supporting an inference of discrimination is an evidentiary standard not a pleading requirement. See e.g. 411 U.S. at 800. The Court has never indicated that the requirements
to pleading a prima facie case apply to pleading. Moreover, the *McDonnell Douglass* framework does not apply where, for example, plaintiff is able to produce direct evidence of discrimination. See *TransWorld Airlines, Inc. v. Thurston 469 U.S. 111, 121. Texas Dep't of Cmty. Affairs v. Burdine 450 U.S. 248,253 (1981 which is evidenced by the "small amount of proof necessary to create an inference of discrimination,"* citing *EEOC v. Flasher Co. Inc., 986 F. 2d. 1312 (10th Cir. 1992).*
The American with Disabilities Act Public Law 101-336: *42 U.S.C. 12101 et.seq.:* specifically: Title I: "*Disability defined: Anyone with a physical or mental impairment substantially limiting one or more major life activities; has a record of such impairment; or is regarded as having such an impairment is considered a person with a disability. Remedies for violations of Title I of the ADA include hiring, reinstatement, promotional, back pay; restored benefits, reasonable accommodation, attorneys' fees, expert witness fees and court costs. Compensatory and punitive damages also may be available in cases of intentional discrimination or where an employer fails to make a good faith effort to provide a reasonable accommodation."*
AND

42 U.S.C. §12102(2)"disability" is (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or C) being regarded as having such an impairment."

SEC. 12112. *[Section 102]* (a) General rule. - No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment
AND Sec. 12112 (Section 102)
5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a

disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or AND

(4) Examination and inquiry. - (A) Prohibited examinations and inquiries. - A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job–related and consistent with business necessity.

d)(1) In general The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

The Civil Rights Act of 1964, Title VII, 42 U.S.C.§2000e, et seq. Section 701(a)(1) .2(a)(1) *provides: " It shall be an unlawful employment practice for an employer... to fail or refuse to hire or to discharge any individual, or otherwise discriminate against an individual in respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin.. "*

Section 704(a) of the Civil rights Act of 1964, 42 U.S.C. 2000e-3(a) provides;

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter.

2000e-2(m): "...unambiguously states that a plaintiff need only demonstrate that an employer used a forbidden consideration with respect to any employment practice. On it's face, it does not mention that a plaintiff must make a heightened showing through direct evidence. Moreover Congress explicitly defined "demonstrates" as to "mee[t] the burdens of production and persuasion." Had Congress intended to require direct evidence, it could have included language to that effect in §2000e-2(m), as it has unequivocally done when imposing heightened proof requirements in other circumstances. [299

F.3d 838]

The Vocational Rehabilitation Act of 1973, 29 U.S.C. §791,794

I. Non-Discrimination

1. The Rehabilitation Act requires agencies to ensure that employment decisions are free of unlawful discrimination on the basis of disability. In 1992, Congress amended the Rehabilitation Act to incorporate the non-discrimination standards of the American with Disabilities Act(ADA). Under the ADA, the term "discriminate" generally includes making unlawful medical examinations or inquiries not providing reasonable accommodations to an otherwise qualified individual with a disability unless the agency can demonstrate that the accommodation would impose an undue hardship on its operations denying opportunities to an otherwise qualified applicant or employee because of the need for a reasonable accommodation; using qualification standards, employment tests or other selection criteria that screen out, or tend to screen out individuals with disabilities unless shown to be job-related for the position in question and consistent with business necessity. The Rehabilitation Act prohibits retaliation against an individual because such individual has opposed any act or practice made unlawful by the Act or because such individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under the Act..

Woodman v. Runyon, 96-4104 (12/24/97) *that the United States Postal Service;* Appellant's employer and Appellee; *"most certainly had duty based on its existing policies to attempt to reassign [Woodman] as part of its duty to provide reasonable accommodation"* and *"had a duty to reassign pursuant to its existing policies pertaining to workers injured on the job"*. Citing Shiring v. Runyon, 90 F.3d 827-32 (3rd Cir. 1996), the 10th Circuit noted in Woodman.

AND

Neither this nor any other circuit court has established the elements of a prima facie case within the specific context of an action brought against a federal employer under section 501 of the Rehabilitation Act. However in Pushin v. Regents of University of Colorado, 658 F.2d 1372, 1386-87(10th Cir. 1981), we set out the following test for the actions brought under section 504. In the meaning of the Act; (1) she is a handicapped person within the meaning of the Act; (2) she is otherwise qualified for the job; and (3) she is discriminated against because of the handicap.

AND

USPS had a duty to reassign pursuant to its existing policies pertaining to workers injured on-the-job as defined by the USPS

5 C.F.R. 724: All reimbursements to the Judgment Fund covered by the NO FEAR ACT are expected to be fully collectible from the agency.

5 C.F.R.724 precludes claims and taxation against federal employees under the NO FEAR ACT. 5 C.F.R.724.103 states *"All reimbursements to the Judgment Fund covered by the NO FEAR ACT are expected to be fully collectible from the agency."*

Retaliation provisions prohibit *"civil charges that are likely to deter reasonable people from pursuing their rights of protected activity and undermines the effectiveness of EEO statutes and conflict with the language and purpose of anti-retaliation provisions."* which such taxation inflicts.

29 C.F.R. 1630.2(g): an individual (3) being regarded as having such impairment, to affect (I) major life functions such as caring for oneself; inability to move arms from torso meets this criteria (k) has been misclassified..(l) regarded as having such impairment means (3) has none of these impairments as defined in (h)(l) or(2) of this section

but is treated by a covered entity as having a substantially limiting impairment.

18 U.S.C. Chapter 79 (1623); (Subornation of:1622);
1621.Perjury generally

Whoever - (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificte, verification, or statement under penalty of perjury as permitted under section 1746 of Title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This action is applicable whether the statement or subscription is applicable whether the statement is made within or without the United States.

K.V. Williams
7216 Lathrop Avenue
Kansas City, Kansas66109-1708
913-334-5906

December 08, 2005

Albert Gonzales,
United States Attorney General
c/o Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530-0001

Re: 10th Circuit Appeal No. 04-3358
Dist./Ag Docket: 02CV-2568-KHV

Sir Attorney General Gonzales:

Justice requires the following information be supplied your office for investigation regarding David Zimmerman, assistant under Eric F. Melgren for the state of Kansas. In spite of this experience, I remain a respectful of the law and its creation to protect and serve the public/me. Christianity compels me to believe righteous, justice can also be obtained through the United States judicial system.

As the law provides for self-representation/pro se; and as my employer insured attorney retention was impossible by compensation uncertainty, the facts of the case, varied pretext and perjuries led me to conclude the blatant infringement of my rights could be determined by examination of presented facts and evidence without counsel. I continue to maintain this as true.

Evidenced by judicial conclusions, the court did not read or examine my filings. Judiciary based its findings presuming an officer of the court - specifically under the guise of the United

States Attorney General would not intentionally misrepresent the facts. Granted, this does not absolve the court of its failure to function as prescribed. However, the actions of your subordinates may be of concern to you.

I am uncertain of your authority to take action and/or the actions you may take in review of this matter should impropriety be determined. Your notification is mandated as the office which represents me and all the citizens of the United States. This is reported in expectation that your office requires its representatives to adhere to and uphold the laws assigned to preserve versus resorting to trickery which has defamed legal counselors in general.

This letter is sent without further detail and/or attachments believing your ability to access judicial EFS. Should the information not be available electronically and/or should you desire more detailed information, it will be supplied upon notification.

Your time, attention and addressing this matter will be appreciated. Thanking you in advance.

Reservedly,
Kathy V. Williams
(Contact Information Above)

Variations cc'd Eric Melgren; DoJ- Civil Rights Division

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

KATHY V. WILLIAMS,)
Plaintiff)
10th Circuit Appeal #: 04-33580
Dist./Ag.: 02-2568-KHV
v.)
JOHN E. POTTER,)
POSTMASTER GENERAL,)
UNITED STATES POSTAL SERVICE,)
Defendant)

COMES now, Plaintiff serving notice to the District Court and Tenth Circuit of appeal of this matter to the United States Supreme Court. Plaintiff seeks adjudication of the full matter and the issues adjudicated by this District Court and the Tenth Circuit Court of Appeals specifically the summary judgments and rulings of the District and Tenth Circuit Court of Appeals. This notice complies with Supreme Court Rule 18(I) and serves again notice of Petitioner's appeal to the Supreme Court of the District Court's overruling Petitioner's request to rehear, District Court's original rulings and in re taxation to Petitioners of costs violating THE NO FEAR ACT of 2002.

Appeal is being made due to the conflicts of uniformity contrary to laws and precedents in re The Civil Rights Act of 1964 *Section 701(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1) in pertinent part provides: " It shall be an unlawful employment practice for an employer... to fail or refuse to hire or to discharge any individual, or otherwise discriminate against an individual in respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin..."* And *Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a) in pertinent part*

provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter AND 5 C.F.R.724 precludes claims and taxation against federal employees under the NO FEAR ACT. 5 C.F.R.724.103 states *"All reimbursements to the Judgment Fund covered by the NO FEAR ACT are expected to be fully collectible from the agency."*

AND EEOC Management Directive 715, retaliation provisions prohibit *"civil charges that are likely to deter reasonable people from pursuing their rights of protected activity and undermines the effectiveness of EEO statutes and conflict with the language and purpose of anti-retaliation provisions."* which such taxation inflicts.

AND The Americans with Disabilities of 1990, The Vocational Rehabilitation Acts, American Constitution and Bill of Rights inclusive of related laws, statutes, provisions and established precedents.

The Court's response to Petitioner's request for rehearing and determination against taxation judgment was received post-filing with the Supreme Court. Mentioned during Supreme filing as unanswered. Corrected submission includes this court's judgment of 22 February 2006 in compliance with The Supreme Court computation of 60 day return requirement. Filings are inclusive of all findings and judgments previously rendered: Summary Judgment In Part of 5th day of May 2004, Summary Judgment sustained on 19th day of August 2004, Affirmed by the Tenth Circuit Court of Appeals on 29th September 2005, denial of En banc rehearing of 21st of November 2005 and taxation and overruling filed by the District Court on 22 February 2006 of Motion For Review (Doc.#141)

The matters brought before the Supreme Court raise questions and issues of federal significance.

s/Kathy V. Williams,
Kathy V. Williams
7216 Lathrop Avenue

Kansas City, Kansas 66109-1708
913-334-5906

DECLARATION OF SERVICE

By signature Petitioner, Kathy V. Williams affirmatively declares Notice was served by hand to the Kansas District Court, and by first class mail to:

The Tenth Circuit Court of Appeals
Byron White U.S. Courthouse
1823 Stout Street
Denver, Colorado 80257

AND

Solicitor General of The United States
Department of Justice Room 5614
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

AND

United States Assistant Attorney General
ATTN: David Zimmerman
500 State Avenue
Kansas City, Kansas 66101

Served on this 27th day of April 2006.
Respectfully Submitted,
[FILE STAMP: 27 April 2006 at 7:15 A.M.]
s/Kathy V. Williams
Kathy V. Williams
7216 Lathrop Avenue
Kansas City, Kansas 66109-1708
913-331-5906